BM.345.1-055

decision given without jurisdiction, without the necessity of a formal order setting it aside"). Mr. Grobbelaar, for the respondent, felt that he was unable to dispute the Court's conclusions on this issue.

This is the second case heard by us in this Session where a Clerk of the Court has entered a default judgment on a damages claim. I think it is very unfortunate that such mistakes should occur and that litigants should thereby be involved in unnecessary costs. The present proceedings will have to be taken up afresh as from the stage where application was made for default judgment; but it is hoped that the views we have expressed on the appellant's grounds of appeal and on other aspects of the case will induce all the parties to arrive at some reasonable settlement.

On the question of costs Mr. van Rooyen contended on behalf of the appellant that he should be awarded costs because the respondent was neglectful in not making sure that his writ of attachment had been validly issued. Mr. Grobbelaar considered that there should be no order. He submitted that the respondent was entitled to assume—as everybody concerned with the case had assumed—that the writ was validly issued. The position is that the appeal had of necessity to succeed on a ground not raised by the appellant; the ground on which the appeal was brought was at least to some extent based on a misconception, and in any event the appeal was, on the record placed before us, not necessary and could have been avoided with the exercise of due care. We feel, therefore, that there should be no order as to costs.

The appeal is upheld with no order as to costs. The judgment of the Native Commissioner and all the proceedings subsequent to the request for default judgment are set aside and the matter is referred back for hearing.

Nel & Lanbley, Members, concurred.

For Appellant: Adv. R. van Rooyen instructed by Smit & Vorster.

For Respondent: Adv. T. Grobbelaar instructed by H. Olmesdahl.

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1959 (1) en/and (2)

REPORTS

OF THE

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AMPTENARE VAN DIE NATURELLE-APPÉLHOWE.
1959.

CENTRAL NATIVE APPEAL COURT.
SENTRALE NATURELLE-APPÉLHOF.

PRESIDENT: J. P. COWAN.

PERMANENT MEMBER/PERMANENTE LID: N. P. J. O'CONNELL.

NORTH-EASTERN NATIVE APPEAL COURT.
NOORDOOSTELIKE NATURELLE-APPÉLHOF.

PRESIDENT: W. O. H. MENGE, succeeded by/opgevolg deur T. D. RAMSAY.

PERMANENT MEMBER/PERMANENTE LID: R. ASHTON, succeeded by/opgevolg deur V. S. S. KING.

SOUTHERN NATIVE APPEAL COURT.
SUIDELIKE NATURELLE-APPÉLHOF.

PRESIDENT: H. BALK.

PERMANENT MEMBER/PERMANENTE LID: E. J. H. YATES.

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NORTH-EASTERN NATIVE APPEAL COURT.

MAODI *v.* **MAODI.**

N.A.C. CASE No. 45 OF 1958.

PRETORIA: 4th March, 1959. Before Menge, President, Ashton and Eaton, Members of the Court.

PRACTICE AND PROCEDURE.

Child—Custody—Powers of Native Commissioner's Court to make and enforce an order for delivery of a child.

Summary: Plaintiff, who had been divorced from defendant, sued the latter for custody of her illegitimate child born prior to the marriage. Defendant resisted the claim on the ground that he was the natural father of the child and that it had been legitimated by the marriage; alternatively that he was given custody by agreement with plaintiff. The Native Commissioner found for the defendant. On appeal the Court reversed the Native Commissioner's decision on the merits and dealt *ex mero motu* with the powers of the Native Commissioner's Court to order the handing over of children.

Held: That the defendant had on the facts not established paternity; that consequently he had no right to custody as against plaintiff, and that his claim to exercise custody by agreement with plaintiff had no foundation in law.

Held further: That a Native Commisioner's court can order the handing over of a child but would have no power to enforce such order by attachment of the child.

Statutes referred to:

Native Divorce Court Rule 13 (1).
Native Commissioner's Court Rule 78.

Cases referred to:

Edwards *v.* Fleming, 1909 T.H. 232.
Bam *v.* Bhadha 11, 1947 (1) S.A. 399.
Kotze *v.* Kotze, 1953 (2) S.A. 184.
R. *v.* Ngunze, 1951 (4) S.A. 679
Ngakane *v.* Maalaphi, 1955 N.A.C. 123.
Lehasa *v.* Cewane, 1947 N.A.C. (T. & N.) 132.
Zwane *v.* Dhlamini, 1951 N.A.C. (N.-E.) 353.
Nkosi *v.* Ngubo, 1949 N.A.C. (N.-E.) 87.
Fubesi *v.* Mandlaka & Ano., 1948 N.A.C. (S.) 10.

Appeal from the Court of Native Commissioner, Pretoria.

Menge, President:—

This is an appeal from the judgment of the Additional Native Commissioner on a claim for delivery of a child. The parties are divorcees. They had been married by civil rites, and the plaintiff's case is that one year and ten months before her marriage to defendant she gave birth to the child in dispute, a boy of 17 years, of whom the late Chief Patrick Moepi was the father and who is in the custody of the defendant. The defendant pleaded that he is the father of the boy and entitled

to custody, and, in the alternative, that the plaintiff agreed to let him have the custody. This alternative plea is not supported by any evidence and in any case, as pointed out by Mr. Jacobs, discloses no defence (see also Edwards *v.* Fleming, 1909 T.H. 232). It need, therefore, not be considered.

The Additional Native Commissioner granted absolution from the instance and the plaintiff now appeals on the facts and on the legal ground that as the onus of proof rested upon the defendant a judgment of absolution was not possible. In his reasons the Native Commissioner conceded this legal point but maintained that on the evidence the defendant had proved his case and that there should have been judgment for defendant.

We do not agree. The only issue is whether or not the defendant is the father of the child. Native law does not enter into the matter except for purposes of evidence or assessing probabilities. The Native Commissioner applied common law and it has not been shown nor, indeed, alleged that he exercised his discretion improperly.

(The President thereupon analysed the evidence and continued):—

It is, therefore, clear that on the evidence the defendant has not established that he is the father of the child. Furthermore, at Common law the defendant's marriage to the plaintiff gave him no rights to the child as against plaintiff irrespective of whether the child is in good hands or not, at least until it is shown that it would be detrimental for the mother to have custody. (see Edwards' case already referred to). Consequently the defendant has not discharged the onus resting on him and judgment should have been for plaintiff.

But the question arises whether a native commissioner can make an order for the delivery of a child and whether it will have any legal force or effect—for a court will not, even by consent, make an order which cannot be enforced. This question was raised but not decided in Ngakane *v.* Maalaphi, 1955 N.A.C. 123.

If a defendant who is ordered to "deliver" or to "return" a child to the plaintiff were to ignore the order no writ of execution could be issued; firstly because the Native Commissioners' Courts' Rules do not, as does Native Divorce Court Rule 12 (1), provide for such an attachment (see R. *v.* Ngunze 1951 (4) S.A. 679), and in any case because the instructions to the messenger of the court as to what precisely he would have to do could not simply be imported into the writ without having been specifically laid down by the court, e.g. delivery how, when, where and to whom (see Bam *v.* Bhadha II, 1947 (I.) S.A. 399 at pages 406 and 407). Even Rule 78, which provides that a person who disobeys or neglects to comply with an order of a Native Commissioner's Court shall be guilty of a contempt of court and punishable, is of no avail in the absence of details as to where, when and to whom the child is to be returned.

So far as I am aware this difficulty has not been dealt with in the Native Appeal Courts since Bam *v.* Bhadha. Orders of this nature were made in the following cases: Lehasa *v.* Cewane, 1947 N.A.C. (T. & N), 132; Zwane *v.* Dhlamini, 1951 N.A.C. (N.-E.), 353; Nkosi *v.* Ngubo, 1949 N.A.C. (N.-E.), 87, and Fubesi *v.* Mandlaka & Ano., 1948 N.A.C. (S.) 10. In none of these cases was Bam *v.* Bhadha referred to and in none save the last-named was the validity of the order considered; and even in Fubesi's case the reason for declaring the order invalid was founded on a somewhat different basis, viz. that a claim for specific performance by A against B should not be allowed if B's ability to perform is in a measure dependent on the attitude of a third party, C.

It seems that a litigant in a Court of Native Commissioner should not, when claiming a child, ask for an order simply for the delivery or return of the child. He should ask for a specific order directing the defendant to hand over the child within a specified time and at a specified place to a specified person. Such an order can be made; but if the defandant fails to comply with it no form of civil execution can be resorted to, at least in the Native Commissioner's Court. The only sanction would be to prosecute under Rule 78. Only the Supreme Court, it seems, could order the attachment of a child—and no doubt also the Native Divorce Courts. So in Kotze *v.* Kotze, 1953 (2) S.A., 184, it was ordered that in default of the child being returned to the mother, who had been awarded custody, "authority be granted to the Sheriff or Deputy-Sheriff to take the necessary steps to have the child returned to the applicant".

In the present case an application for a specific order for the delivery of the child was made at a later stage of the proceedings. The Native Commissioner had the power to grant this, but, in view of what has been said it would not have been possible for him to do more than to make that order. He would have had no power to order attachment on failure to comply with the order.

The appeal is upheld with costs. The judgment of the Native Commissioner is set aside and the following judgment substituted: "It is ordered that the defendant deliver the minor child Mashilo Nkomishe to plaintiff or her nominee at the office of the Native Commissioner, Pretoria, or at such other place as the parties may arrange, on the 31st March, 1959, or on such earlier date as the parties may arrange."

Ashton & Eaton, Members, concurred.

For Appellant: F. A. Jacobs, of H. Helman.

For Respondent: P. B. Angelopulo.

NORTH-EASTERN NATIVE APPEAL COURT.

MKHIZE *v.* SIKHAKHANE.

N.A.C. CASE No. 71 OF 1958.

PIETERMARITZBURG: 31st March, 1959. Before Menge, President, Ashton and Gillbanks, Members of the Court.

NATIVE CUSTOM.

Delict—Damage caused by animals—Failure to cut off tips of sharp horns.

Summary: Defendant's bull had gored and killed the bull of plaintiff. The former animal was not shown ever to have exhibited vicious propensities, but it had very sharp horns which the defendant had refused to blunt in spite of having been advised to do so. Plaintiff sued for damages.

Held: The mere refusal to blunt the dangerously sharp horns of an animal which has not manifested vicious tendencies is not negligence.

Cases referred to:

Mhlongo *v.* Mhlongo, 1940 N.A.C. (T. & N.) 126.
Mgadi *v.* Magwaza, d/a, 1945 N.A.C. (T. & N.) 87.
Sibiya *v.* Mtshali, 1 N.A.C. (N.-E.) 198.
Makoba *v.* Langa, 1952 N.A.C. 76.

Appeal from the Court of Native Commissioner, Mahlabatini.

Ashton, Permanent Member:—

In a Chief's Court plaintiff sued defendant for "compensation for his one bull calf which was gored by defendant's bull and the said bull calf died as a result of the injuries".

Defendant denied liability and the Chief absolved him from the instance with costs, stating that the calf got injured on the commonage and there was insufficient evidence to prove that defendant's bull caused the injury.

Plaintiff appealed against the Chief's judgment to the Native Commissioner and there, the pleadings were taken afresh. In his plea the defendant is recorded as stating "that his bull did kill plaintiff's young bull in the grazing ground but he refused to pay as plaintiff did not notify him that his bull should not, and his bull did in fact not mix with plaintiff's cattle".

After hearing evidence for both parties the Acting Native Commissioner gave judgment in these terms:—

"(1) The appeal is upheld with costs.

(2) The Chief's judgment is altered to read "For plaintiff for one beast and costs".

That judgment has now been brought on appeal to this Court by defendant on the grounds that "it is against the evidence and weight of evidence, that on the facts of the case the killing was not actionable under Native law and custom and that no negligence was proved against the defendant".

In the case of Sibiya *v.* Mtshali 1 N.A.C. (N.E.) 198 (a case emanating from the same district as this case) it was accepted by this Court that in Native law it was clear that unless an animal had shown previous vicious propensities its owner would not be liable for damages to an animal injured by it on the commonage. This statement of the law was based on two previously decided cases in Natal and in the Cape respectively. In the latter it was stated "If a cow is vicious its owner is told to cut off the tips of its horns and if he neglects to do so he is held liable for damages subsequently done by it and that it is the duty of a man owning a vicious cow to cut off its horns without being asked to do so".

In the case of Makoba *v.* Langa, 1952 N.A.C. 76 (S.) reference was made to large number of cases and it was held:—

> "That in Native law the owner of an animal (not being a dog) is not liable for damage or loss caused by it unless he was aware of its vicious propensities and took no adequate precautions to guard against loss to others.
>
> That respondent's horse had never shown vicious propensities and that therefore he was not negligent in allowing it to run loose on the commonage where it was entitled to graze."

To refer back to the case in Natal referred to above [Mgadi *v.* Magwaza, d/a 1945 N.A.C. (N. & T.) 87] the learned President, McLoughlin, without quoting his authority is reported as having said—"No liability is incurred normally where an animal, normally not vicious, suddenly attacks and injures a person on the commonage. It is regarded as bad luck . . . . The position is entirely different when once it is known that an animal is vicious. Native custom requires that the owner should thereupon take all steps necessary to protect the public".

In the case of Mhlongo *v.* Mhlongo, 1940 N.A.C. (T. & N.), 1926, where an ox was killed by a bull there was evidence that the animals had been together for a number of years without exhibiting any vicious tendencies until one day at the dipping tank the bull attacked and killed the ox. It was held that there having been no evidence of the bull having had vicious propensities the Native Commissioner's judgment of absolution could not be upset.

In the case now on appeal there is evidence that the defendant's bull had sharp horns and that two years prior to goring plaintiff's animal he had been warned to take steps to blunt them. Defendant admitted in evidence that his bull did injure plaintiff's beast on the commonage and that "plaintiff's brother did warn me to have my bull's horns bluntened because it is dangerous". He also admitted that his bull had dangerous horns.

Defendant did not do anything to render the horns less harmful because, he said, he had never seen the bull "doing anything wrong".

There is no evidence that defendant's bull ever showed any vicious tendencies prior to the goring of plaintiff's calf—at any rate over a period of 2 years from the time when its horns were said to be dangerous it apparently did nothing to indicate any viciousness. There can accordingly be no fault to find with defendant's statement which he made in evidence—"It must have been a mistake when my bull injured his (plaintiff's) bull, because previously it ran with his cattle and did not cause any trouble".

I think it must be accepted as Native law in Natal that damages are not payable by the owner of an animal which has not been shown to have vicious propensities and which does damage to another's animal (or person) unless some specific act of negligence on the owner's part can be shown to have been the cause of the damage.

The Acting Native Commissioner regarded defendant's failure to render his bull's horns harmless as negligent but there must be thousands of cattle with sharp horns which are running on commonages which have no vicious propensities and it would be unreasonable to say their owners are negligent.

The appeal is allowed with costs. The Acting Native Commissioner's judgment is altered to read: "The Appeal from the Chief's Court is dismissed with costs and the Chief's judgment of absolution from the instance with costs is upheld".

Menge, President: I concur.

Gillbanks, Member: I concur.

For Appellant: Mr. N. Goosen.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

NXUMALO *v.* MLUNGWANA.

N.A.C. CASE No. 74 *of* 1958.

ESHOWE: 28th January, 1959. Before Menge, President, Ashton and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—Necessity to record pleadings—Onus to begin before Native Commissioner.

Summary: In an appeal against a Chief's judgment the Native Commissioner had not clarified the claim and defence recorded by the Chief which were inadequate as pleadings, and he called upon the party who lodged the appeal to commence, although that party was the defendant before the Chief. The Native Commissioner dismissed the appeal and the defendant appealed further.

Held: The proceedings were irregular in both respects.

Statutes referred to:

Section 12 (4), Government Notice No. 2885 of 1951.
Appeal from the Court of Native Commissioner, Ubumbo.

Menge, President: This case started before a Chief. The written record describes the action, defence and judgment as follows:—

> "PARTICULARS OF CLAIM: Payment of (1) four (4) head of cattle, (2) £15 in cash advanced for lobola purposes—girl jilted ptff.
>
> "PARTICULARS OF DEFENCE: Denied liability.
>
> "JUDGMENT: For plaintiff for (1) four (4) head of cattle, (2) £15 with costs £2. 2s. 6d."

The Chief's reasons for judgment do not add anything. They are a mere re-statement of the claim and do not assist in the least.

The Native Commissioner heard evidence, first from the defendant in the Chief's Court (the appellant in this and in the Native Commissioner's Court) and from his daughter and then from the plaintiff in the Chief's Court (respondent in this and the Native Commissioner's Court) and thereupon he dismissed the appeal with costs. It will be convenient to refer to the parties as plaintiff and defendant as they appeared before the Chief. Neither was represented in the Native Commissioner's Court. The defendant now appeals to this Court on the facts and a further ground which reads as follows:—

> "That the learned Native Commissioner stopped me from putting questions to plaintiff in which questions I was establishing my case".

The proceedings before the Native Commissioner were quite irregular. In the first place the pleadings were not in order. No doubt the particulars of claim and defence as given are adequate for a Chief's Court, for such a Court is not a Court of law. But once the action comes before the Native Commissioner's Court the position is different. It is then before a Court of law and can only proceed after the issue has been clearly formulated in the pleadings. Now, one can perhaps say that the particulars of claim disclose a sufficient cause of action in Native Law. The meaning seems to be that plaintiff paid four head of cattle and £15 as *lobolo* for an intended marriage with defendant's daughter; that this marriage did not materialise

through the fault of the girl; that the plaintiff is in these premises entitled to a refund of what he paid and that the defendant has failed to make the refund. But a bare denial of liability is not good enough. The Native Commissioner should have asked the defendant what his defence is. He should have asked defendant whether or not he received four head of cattle as *lobolo* in respect of the intended marriage; whether he also received a further £15 in cash; whether his daughter did jilt the plaintiff; whether he has refunded what he received and, if not, on what grounds he resists the claim.

Secondly, the onus to begin was wrongly placed on the defendant. True, he is the appellant, but that did not saddle him with the onus to begin. Section 12 (4) of the Rules for Chief's Courts makes it plain that the Native Commissioner shall hear the appeal as if it were a case of first instance, and this has often been laid down in this Court. As it is the defendant was called upon to put up a defence to a case which had not even been made out against him, and one can only sympathise with him in his difficulty of having to establish his case through putting questions. In these circumtances the judgment against him cannot stand, the more especially as the evidence, in this inverse order, is difficult to follow and far from clear. The case will have to be heard *de novo* after a proper plea, at least, has been recorded. The plaintiff, who was successful before the Chief, will have to present his case first and thereafter the defendant his, and the Native Commissioner will then decide whatever the issue may be on the pleadings.

The appeal is upheld with costs. The Native Commissioner's judgment is set aside and the matter referred back for re-hearing.

Ashton, Permanent Member:—

The evidence was difficult to follow because of the wrong procedure adopted by the Native Commissioner in his Court and I agree that the case should be sent back for hearing on the lines set out in the learned President's judgment.

Botha, Member: I concur.

For Appellant: J. G. Barnes.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

MTIMKULU *v.* MTIMKULU.

N.A.C. CASE No. 77 OF 1958.

VRYHEID: 7th January, 1959. Before Menge, President Ashton and Colenbrander, Members of the Court.

NATIVE LAW.

Wedding outfit—Recovery by kraalhead of wedding expenses incurred without consent of girl's guardian.

Summary: Plaintiff was the kraalhead of a girl who had run away from her parents' home. He gave her in marriage and incurred certain wedding expenses without seeking the consent of the girl's lawful guardian. The Native Commissioner had upheld a claim for the recovery of these expenses. On appeal—

Held: (Ashton, Permanent Member, dubitante) following Cape Native Law: if a kraalhead is in a position to obtain or to endeavour to obtain, the consent of the guardian of a

female inmate of his kraal to her marriage celebrations, then he neglects to do so at his own risk and cannot recover what he has spent on her marriage celebrations or by way of wedding outfit.

Cases referred to:

Xosana *v.* Dalisile, 3 N.A.C., 189.
Mkize *v.* Mdunge, 1939 N.A.C. (T. & N.), 107.
Qwabe *v.* Qwabe, 1940 N.A.C. (T. & N.). 15.
Kanyile *v.* Magubane, 1941 N.A.C. (T. & N.), 43.
Mcunu *v.* Mcunu, 1946 N.A.C. (T. & N.), 48.
Ntyingile *v.* Ntyingile, 1913 N.H.C. 140.

Appeal from the Court of the Native Commissioner, Nongoma.

Menge, President:—

The accepted facts in this case are that the defendant's daughter, Shoniswaphi, lived in the plaintiff's kraal for six years, having run away from defendant's kraal, and thereafter married. Plaintiff, as her kraalhead, apparently paid the wedding expenses, and he sought to appropriate the dowry paid for himself. Defendant thereafter sued plaintiff for this dowry and obtained judgment. The judgment has only been satisfied in part so far.

Plaintiff then sued before the Chief for £35 and three head of cattle which, he stated, he had expended on the marriage celebrations and on the wedding outfit. Defendant simply denied liability, but it is not stated on what grounds. The Chief gave judgment for plaintiff.

The defendant thereupon appealed to the Native Commisioner. There, too, the defendant did not state what his defence is, and the Chief's reasons are not of much avail. After hearing the evidence the Native Commissioner upheld the appeal to the extent of reducing the amount awarded to £20 and the cattle to two head—there is no alternative value as regards the two head of stock. The Native Commissioner considered that only £20 of the £35 claimed had been proved to have been expended on the wedding outfit and that in Native Custom only two head of stock would normally have been slaughtered for the marriage ceremonies.

The defendant who was represented now appeals once more on the following grounds:—

"1. That in view of the fact that plaintiff always knew that defendant was the father and guardian and entitled to the *lobolo* of Shoniswapi, the Court should have given judgment in favour of defendant.

"2. In any event the Court erred in finding in favour of plaintiff as there is no right in existence by which plaintiff can claim from defendant a refund of the 'expenses incurred' for or on account of the celebration of the Customary Union of Shoniswapi."

These grounds of appeal are not very well worded, but it is apparently contended that the plaintiff was not entitled to a refund in the circumstances of the case. The matter will be considered on that basis.

In the Cape the law, which has consistently been followed, is that the girl's kraalhead is only entitled to a refund of his expenses if he has obtained the prior approval of her guardian—see Xosana *v.* Dalisile, 3 N.A.C. 189 and the other cases cited in Seymour's *Native Law in South Africa* at page 103.

In the present case the plaintiff gave no evidence of any prior consultation with defendant, let alone approval. The girl herself mentioned in cross-examination that plaintiff had reported to the

defendant, but the defendant strenuously denied this. In the absence of any evidence by the plaintiff himself on the point it cannot be said that any consultation did take place.

In Natal there seems to be no case directly in point. Mr. Myburgh who appeared before us for the appellant was unable to cite any such case. The recovery of expenses was allowed without prior consultation in Ntyingile *v.* Ntyingile, 1913 N.H.C. 140; in Qwabe *v.* Qwabe, 1940 N.A.C. (T. & N.) 15, and in Kanyile *v.* Magubane, 1941 N.A.C. (T. & N.) 43; but in all these cases the kraalhead acted as guardian in his own right. The guardianship of another was never acknowledged and there was no question of consulting anybody. However, in Mcunu *v.* Mcunu, 1946 N.A.C. (T. & N.) 48, McLoughlin (President) seems to have thought that maintenance in respect of children cannot be recovered in the absence of approval of the guardian. In Mkize *v.* Mdunge, 1939 N.A.C. (T. & N.) quoted by Mr. Myburgh a similar view had been taken.

It seems that if a kraalhead is in a position to obtain or to endeavour to obtain, the consent of the guardian of a female inmate of his kraal to her marriage celebrations, then he neglects to do so at his own risk and cannot recover what he has spent on her marriage celebrations or by way of wedding outfit.

In the present case the plaintiff should not have succeeded even to the extent allowed by the Native Commissioner.

The appeal is upheld with costs and the judgment of the Native Commisioner is altered to read:—

"The appeal against the Chief's judgment is upheld with costs and a judgment of absolution from the instance substituted for the judgment of the Chief."

Ashton: Permanent Member:—

The facts appear in the judgment of the learned President.

In his evidence in the Native Commissioner's Court plaintiff said that he "gave the girl in marriage because she lived with me having been driven away by defendant as the *lobolo* for her was due to me, my father having paid the *lobolo* for defendant's wife. Defendant gave me authority over the girl. I had supported her for five years and married her off in the sixth year".

Against this defendant said: "I was told to leave the girl with my sister at plaintiff's kraal . . . I gave plaintiff no authority over the girl. I know that the girl is married. I heard after she got married. I did not hear from plaintiff. I sued plaintiff for the *lobolo* . . ."

In his reasons for judgment the Native Commissioner states that "it is a recognised custom that a person is entitled to claim expenses incurred in connection with a person living in his kraal whose care is not ordinarily his responsibility. The amount of expenses is determined by the Native Commissioner according to common law. (See *Principles of Native Law,* Stafford & Franklin, page 285 (12)]." But the authority he quotes is purely in relation to *isondhlo* and does not state anything more than that claims additional to *isondhlo* may be dealt with under common law. The slaughter of cattle at a wedding ceremony hardly comes under the heading of maintenace or *isondhlo.*

Reference to note (9) on the same page referred to by the Native Commissioner will show that this Court has ruled that where a man has exercised the functions of the guardian in regard to maintenance of children under the true guardianship of another and without that other's consent he cannot claim a refund of maintenance. Would not the same principle apply in this case?

The Zulu custom on the question whether a person in circumstances such as this could reclaim the expenditure incurred by him is not known to me and my suggestion that Assessors be called to advise on the point has been rejected by the other two learned members of this Court. It may be that the principles of the Cape decisions may be applicable in Natal but I am not prepared to say they do.

Despite the fact that defendant admitted that a wedding outfit would have had to be provided and that cattle would have had to be slaughtered by him if he had married off his daughter it is not clear that plaintiff had the right to be refunded what he expended unless he had defendant's mandate for the expenditure.

In all the circumstances I reluctantly come to the conclusion that plaintiff has not proved that his claim is legally payable and I think that the appeal must be allowed with costs; the Native Commissioner's judgment must be set aside and an absolution judgment substituted for it.

Colenbrander, Member: I agree with the judgment of the learned President.

For Appellant: H. L. Myburgh.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

DLUDLU *v.* **MYENI.**

N.A.C. CASE No. 88 OF 1958.

ESHOWE: 28th January, 1959. Before Menge, President, Ashton and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Pre-trial conference—Procedure and objects.

Summary: The plaintiff, Myeni, sued the first defendant, Dludlu, and another for the refund of stock paid as dowry in respect of a Native customary union which failed to materialise. The particulars of claim were not at all clear. First defendant denied some of the allegations in the summons and professed to have no knowledge of the remainder. The Native Commissioner held a pre-trial conference. Thereupon, without recording any order on the points thought to have been settled at the conference; without having the pleadings amended to accord with these points, and without a trial the Native Commissioner gave judgment against first defendant. The latter thereupon appealed.

Held: Without a trial of the action the judgment was not possible on the pleadings as they stood.

Pre-trial procedure discussed. (Passages not relevant to this note have been omitted from the judgment.)

Statutes referred to:
Native Commissioners' Courts Rule 47 (Govt. Notice No. 2886 of 1951).

Appeal from the Court of the Native Commissionor, Ingwavuma.

Menge, President:—

. . . . . .

These pleas were filed on the 26th August, 1958. On the same day a pre-trial conference was held (this appears from the Native Commissioner's reasons for judgment—there is no indication hereof in the record of the proceedings). The Native Commissioner recorded the minutes of this conference. Therein mention is made of further £12 paid by plaintiff as *lobolo;* but as no refund of this money was claimed by the plaintiff and as it forms no part of the pleadings nothing turns on it. Apparently the Native Commissioner endeavoured to ascertain, without the necessity of a proper trial, how much had been paid as *lobolo,* and how much refunded. The record of this does not make much sense.

. . . . . .

No attempt was made to amend the pleadings although the points of agreement which are recorded at this pre-trial conference are completely in conflict with the defendants' pleas.

At the end of the conference, without any trial of the action, the Native Commissioner gave judgment for 10 head of cattle against defendant No. 1 and judgment for defendant No. 2, and no order as to costs. The Native Commissioner did so after defendant No. 1 had addressed him in argument according to the record as follows:—

> "Why if he got 6 cattle from No. 2 defendant does he now claim from me? . . . . Why am I involved in this matter? Now the increase is wanted while I know nothing about the cows."

Nevertheless the Native Commissioner says in his reasons for judgment that the agreement of the parties was "so complete in essential details that there appeared to be no need to hear evidence".

Pre-trial procedure is intended to simplify the issues and to shorten the trial, not to serve as an informal substitute for a trial. Section (4) of Rule 47 sets out clearly what order the Court *shall make* at the end of the conference. If agreement on certain points has been reached which alters the issues as fixed by the pleadings, then it is the duty of the Court to see to it that application is made to amend the pleadings (see Jones & Buckle: *The Civil Practice of the Magistrates' Courts in South Africa,* 6th edition, page 180). In the present case no order at all was made. The conference ends with the words:—

> "plaintiff finally claims 10 head of cattle and costs".

Thereupon follows the address to the Court by defendant No. 1 from which extracts have already been quoted, and then follows the judgment.

The appeal is upheld with costs and the judgment of the Native Commissioner as regards defendant No. 1 is altered to one of absolution from the instance with costs.

Ashton and Botha, Members, concurred.

For Appellant: S. H. Brien.

For Respondent: J. G. Barnes.

NORTH-EASTERN NATIVE APPEAL COURT.

NZAMA *v.* SHANGE.

N.A.C. CASE No. 92 OF 1958.

PIETERMARITZBURG: 1st April, 1959. Before Menge, President, Ashton and Bayer, Members of the Court.

NATIVE CUSTOM.

Delict—Pressing marriage suit against wishes of intended bride—no injuria.

Summary: Defendant wished to marry plaintiff's daughter as second wife. He sent his messengers to negotiate, though aware of the girl's disinclination to enter into the union. Plaintiff sued for damages on the ground that the defendant's act constituted an insult.

Held: To press a suit in these circumstances may have been a breach of etiquette but was not actionable in that no legal right was infringed.

Cases referred to:

Sosibo *v.* Tshibase, 1942, N.A.C. (T. & N.), 79.
Ngcobo *v.* Ngcobo, 1, N.A.C. (N.-E.), 47.

Appeal from the Court of the Native Commissioner, Pinetown.

Ashton, Permanent Member:—

In a Chief's Court plaintiff sued defendant for the payment of £10 "being damages by reason of the defendant having sent certain people to plaintiff's kraal and insulting plaintiff at his, plaintiff's kraal—the said people being Mhlakazane Bhengu and one Shizizwe Ngubane, the said people having been sent to seek the hand of plaintiff's daughter in marriage whereas plaintiff's daughter was not in love with defendant".

Defendant's plea was to the effect that his messengers went to ask for the hand of plaintiff's daughter who, he maintained, was in love with him.

The Chief gave judgment for plaintiff for £5 and costs and the defendant appealed to the Native Commissioner, who, after hearing evidence for both sides, dismissed the appeal and upheld the Chief's judgment.

That judgment has now been brought on appeal again by defendant on the grounds that it was against the evidence and weight of evidence and that the conduct complained of was not an actionable wrong.

The Chief in his reasons for judgment found that defendant had sent his *abakongi* to plaintiff's kraal against what is accepted as Native custom in that he found that the girl was not in love with and had not accepted defendant.

In effect that is exactly what the Native Commissioner found for he states in his reasons for judgment that "when the defendant was fully aware that the courtship had ended and that there was no prospect of consent to marriage being obtained

sent two *bakongi* to the plaintiff's kraal to discuss a proposed marriage between the parties. Such an action by the plaintiff constituted an actionable wrong according to Native law and rendered the defendant liable to damages".

Evidence of what is Native custom on the points relative to this action was given by plaintiff, his wife and his daughter and it was accepted by the Native Commissioner as it was not challenged. But Custom needs more proof than that if it is to be accepted as having the force of law and evidence should have been obtained from assessors or expert witnesses if the Native Commissioner did not of his own knowledge and experience know the custom.

But even assuming that the Custom was correctly stated—and it is not contradicted that it was—the Native Commissioner was hardly right when he wrote in his reasons for judgment—"He (defendant) explained that the *Bakhongis* were sent to the kraal to obtain permission for Qondile to live with him as his concubine. The Court was satisfied that Qondile had made no such offer". It is true that Qondile had refused to come to defendant's kraal and live with him and then allow messengers to be sent to her parents reporting this. Defendant himself said this but he went on and said "She insisted that she had to be 'asked for' and that is why I sent the *Mkongis* to do the asking". Thus there was no reason for the sending of the *abakongi* other than "to seek the hand of his (plaintiff's) daughter in marriage to defendant" as it was put by Mhlakazana Bhengu one of the *abakongi*.

This same *mkongi* went on to say that when he and his companion went to plaintiff's kraal plaintiff's wife said her husband was absent and told them to come the next day which they did. There could not have been much wrong with their conduct if the wife told them to return.

Section 130 of the Natal Code of Native law provides that a "wrongful" act committed against a Native by a Native founds an action for damages against the latter and this Court in the case of Sosibo *v.* Tshibase, 1942 N.A.C. (T. & N.) 79 accepted Maasdorp's definition of a "wrong" as the basis of interpreting "wrongful" in this section. "Wrong" in that definition is "an infringement or violation without any legal justification or excuse of any legal right of another person" and it is difficult to say what right of plaintiff's was infringed or violated when defendant sent messengers to ask his daughter's hand in marriage.

In the same case the Court held that the "wrongful act" referred to in section 130 of the Code means a wrongful act which is actionable and does not cover every act which may result in injury.

At the most, all that defendant did amounted only to a breach of etiquette and it was held in the case of *Ngcobo v. Ngcobo* 1 N.A.C. (N.E.) 47 that a breach of etiquette or lack of good manners does not give rise to an action for damages.

The appeal is upheld with costs and the Native Commissioner's judgment is altered to read "Appeal from the Chief's Court is upheld with costs and judgment for defendant with costs substituted for the judgment of the Chief".

Menge, President: I concur.

Bayer, Member: I concur.

For Appellant: Adv. D. L. Pape, i/b. Cowley & Cowley.

Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

MOLEPO *v.* MOGANO.

N.A.C. CASE No. 98 OF 1958.

PRETORIA: 5th March, 1959. Before Menge, President, Ashton and Eaton, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from judgment of Chief—Counterclaim for recovery of stock attached under such judgment—No cause of action.

Summary: A Chieftainess had given judgment in favour of plaintiff for the return of *lobolo* on the ground of the desertion of his wife. In terms of this judgment certain stock of the defendant was attached. Defendant thereupon appealed to the Native Commissioner. The latter reversed the chieftainess's decision and also made an order, for which the defendant had asked, that the cattle which had been attached must be returned. In a further appeal by plaintiff to this Court only the order for restoration of the cattle was attacked.

Held: That even if the defendant's request for an order for the return of the cattle were accepted as a valid counterclaim, it disclosed no cause of action.

Statutes referred to:

Section 12 (2) of the Rules for Chiefs' Civil Courts (Government Notice No. 2885 of 1951).

Appeal from the Court of Native Commissioner, Pietersburg.

Ashton, Permanent Member:—

In the Court of a Native Chief plaintiff sued defendant for the return of his *lobolo* stating that his wife had deserted him for another man. Defendant's reply, as amplified when the case was on appeal in the Native Commissioner's Court, was that the *lobolo* was not paid to him and that he was not the guardian or the "eldest Uncle" of the girl, Alebina Mogana, the wife of plaintiff.

The plaintiff did not claim the return of his wife or the refund of his *lobolo* nor did he indicate how many cattle he paid and how many he claimed should be refunded.

The Chieftainess, who tried the case, is recorded as having given the following judgment: "Judgment was that Philemon should pay back *lobolo* cattle" and she gave as her reasons for the judgment that it "was given against Philemon because his Brother's daughter deserted from Kgabe and stays with another man and the judgment was that Kgabe must get his *lobolo* back".

Defendant appealed against this judgment to the Native Commissioner's Court where, after hearing evidence for both parties the appeal was upheld with costs and the judgment of the Chief's

Court was altered to read: "Judgment for defendant with costs and it is ordered that the 20 head of cattle and 12 goats attached be returned to the defendant".

The Native Commissioner's judgment has now been brought by plaintiff on appeal to this Court on the ground that it is against the evidence and against the weight of evidence.

An application to amend the ground of appeal by adding the following paragraphs was granted by this Court at the commencement of the hearing of the appeal:—

"1. That the Court erred in hearing any evidence and giving judgment on the issue as to whether Kgabe Solomon Molepo received 22 head of cattle and 12 goats or any other number.

2. The said P. Mogano should have instituted a separate action against Molepo for the return of the cattle and goats. The onus would then have been on Mogano to prove the number of cattle so taken by the Messenger and delivered to Molepo".

Having been granted permission to so amend the grounds of appeal, Mr. Levy for plaintiff, informed the Court that he was not pressing the original ground of appeal and conceded that that part of the Native Commissioner's judgment "The appeal is upheld with costs and the Chieftainess' judgment is altered to read: Judgment for defendant with costs" was in keeping with the evidence adduced. In this concession this Court is in agreement.

He then proceeded to argue the amended parts of his appeal attacking the order for the restoration of the attached stock.

It appears from the record that defendant filed a statement of defence with the Native Commissioner when appealing to this Court against the Chieftainess' judgment. Paragraph No. 7 of that statement reads:—

"7. Appellant says that 22 head of cattle and 12 goats were removed from his possession in terms of the aforesaid judgment of Chief Molepo and that the Appellant states that the removal of the cattle and goats was wrongful and unlawful and that he applies for the Chief's judgment to be set aside and for the 22 head of cattle and the 12 goats to be returned to him".

In his reasons for judgment the Native Commissioner said he found it proved that plaintiff attached from defendant twenty-two head of cattle and twelve goats in pursuance of the Chieftainess' judgment which did not stipulate the number of animals to be returned. He proceeded to say that as the Chieftainess' judgment was found to be wrong the attachment was wrong and that the defendant was entitled to have the attached cattle restored to him. He then pointed out that to have the restoration order made defendant should either have counter-claimed for them or instituted a separate action for them and he suggested that as neither of these modes of procedure had been adopted he was wrong in making the order he did.

With these sentiments Mr. Levy associated himself but Mr. van der Spuy, for defendant, contended that the Native Commissioner did have before him a counter-claim and was entitled to make an order though he conceded that this did not include the right to make it an order of the Chieftainess' Court but rather of his own Court.

There can be no doubt that plaintiff was within his rights in executing upon the Chieftainess' judgment and it is equally clear that when that judgment was altered from one for plaintiff to

one for defendant, plaintiff automatically became obliged to restore all that he had acquired by attachment from the defendant. There was, in fact, no need on the papers before it for any order from the Court for this restoration. If any dispute arose as to what was to be restored it would have to form the subject of an action separate from the appeal.

At the stage when defendant made his statement of defence there was nothing to indicate the wrongfulness or unlawfulness of the attachment—it was stated to have been in terms of the Chieftainess' judgment and even if it had been regarded as a claim in reconvention a plea from the defendant-in-reconvention (plaintiff) that the attachment was as alleged would have disposed of the matter in his favour.

Mr. van der Spuy, when asking this Court to regard paragraph No. 7 of the Statement of Defence as a counter-claim, offered to have it stamped in accordance with law. He pointed out that Chiefs' Courts Rule No. 12 made provision for such a counter-claim but admitted that the Native Commissioner did not and was not asked to accept it as such and that the requirement that plaintiff plead to it was not complied with.

Even if Mr. van der Spuy's request were granted, judgment could not have gone in his favour as at the time the Statement of Defence was made the Chieftainess' judgment still stood and it was only after the setting aside of that judgment that any cause of action could arise.

In the circumstances the request that paragraph No. 7 of the Statement of Defence be regarded as a counter-claim must be refused and the consequence of this refusal is that plaintiff's appeal in so far as it relates to the order for the return of the attached stock must be allowed while that part of it relating to the claim for *lobolo* cattle must be dismissed.

The proceedings in this Court, except for the brief statement by plaintiff's Attorney that he was not pressing the original part of his appeal, was devoted to argument on the order for the return of the attached cattle. Mr. van der Spuy chose to make an issue of the second part of the appeal and having failed the Court considers that plaintiff's success on this part must carry with it the costs of the appeal to this Court.

The judgment of the Court is as follows:—

1. The appeal in so far as it relates to the claim for the return of *lobolo* is dismissed.
2. The appeal in so far as it relates to the attachment of the cattle is upheld and the words "and it is ordered that the 20 head of cattle and 12 goats attached be returned to the defendant" appearing in the Native Commissioner's judgment are expunged.
3. Defendant is ordered to pay the costs of this appeal.
4. For the sake of clarity the Native Commissioner's judgment as amended by this Court is now stated as follows: "The appeal is upheld with costs and the Chieftainess' judgment is altered to read: 'Judgment for defendant with costs'."

Menge, President, and Eaton, Member, concurred.

For Appellant: Mr. Levy.

For Respondent: Adv. A. S. v. d. Spuy, i/b. Gillett and Du Toit.

NORTH-EASTERN NATIVE APPEAL COURT.

ZWANE *v.* BHENGU.

N.A.C. CASE No. 102 OF 1958.

PIETERMARITZBURG: 2nd April, 1959. Before Menge, President, Ashton and Richards, Members of the Court.

MAITENANCE.

Res judicata—Complaint finally disposed of—No re-opening possible.

Summary: A Native Commissioner had refused an order of maintenance sought by a woman against defendant, the father of her illegitimate grandchild. Subsequently the summons was re-issued against defendant with a fresh date of set down but without any fresh complaint on oath having been lodged; and thereupon the Native Commissioner made an order for the payment of maintenance by defendant. The latter appealed.

Held: Having disposed of the complaint under oath which had been placed before him, the Native Commissioner had no power to re-open the case and take further proceedings on the same complaint.

Statutes referred to:
Section 2, Act 10 of 1896, Natal.

Appeal from the Court of the Native Commissioner, Durban.

Menge, President:—

This is an appeal against an order by the Assistant Native Commissioner in terms of which the appellant has to pay £2 per month towards the maintenance of his illegitimate child under the provisions of the Deserted Wives and Children Protection Act, 1896 (Act No. 10 of 1896, Natal). The appeal was brought on the ground that paternity has not been proved; but the merits of the case were not argued because this Court *ex mero motu* held that the order was not valid.

The position is that a complaint was made on oath on the 21st August, 1958, not by the mother of the child but by its grandmother, Rose Bhengu, who appears as plaintiff on the record and who is now the respondent. The Assistent Native Commissioner issued his summons on the 21st August requiring the Appellant to appear on the 25th Septembre. On that day both parties and the mother of the child were present; evidence was heard and thereupon the application was refused. That ended the matter.

The order now appealed against was made on the 24th November, 1958. No new complaint on oath had been made and no fresh summons was issued. The old summons was merely re-served with the date of set down altered from the 25th September to the 24th November, 1958. This alteration appears to have been initialed by someone and it bears a date stamp, but there is no indication that any Native Commissioner so re-issued the summons. In any case there is no authority for thus re-opening proceedings which have been finally disposed of in so far as the original complaint was concerned. Mr. de Wet, on behalf of the respondent argued that this is merely a technical defect, but that is not so. The case of R. *v.* Safeda, 1950 (2) S.A. 55 (N.) makes it abundantly clear that it is the complaint on oath which empowers the Native Commissioner

to open an enquiry in terms of the Act. Without such a complaint before him the Native Commissioner had no jurisdiction, and consequently the order he made on the 24th November is a nullity and need not be complied with even if we were to dismiss the appeal on the merits.

In regard to the question of costs Mr. van Niekerk intimated that he left the matter entirely in the hands of the Court.

The appeal is upheld with no order as to costs. The order of the Native Commissioner is set aside and the following substituted: "The matter is struck off the roll".

It remains to be remarked that the Clerk of the Court issued a wrong certificate when he certified the copies of the record as correct. The date was left out of the copies of the summons and the two returns of service endorsed at the back of the summons were omitted altogether.

Ashton, Permanent Member: I concur.

Richards, Member: I concur.

For Appellant: Adv. C. G. van Niekerk, instructed by C. Cornish & Co.

For Respondent: Adv. P. M. M. de Wet, instructed by Cowley & Cowley.

NORTH-EASTERN NATIVE APPEAL COURT.

XIMBA *v.* XIMBA.

N.A.C. CASE No. 104 OF 1958.

ESHOWE: 21st April, 1959. Before Menge, President, Ashton and Botha, Members of the Court.

NATIVE CUSTOM.

Ukuwenzelele *custom—Action for recovery of loan where daughter designated as source of refund—Necessary averments.*

Summary: Plaintiff sued for the recovery of stock advanced to a relative for *lobolo* purposes. A daughter of the house created by the consequent marriage was designated as the source of refund of the loan.

Held: That to establish a cause of action the plaintiff must allege and prove that *lobolo* has been received by defendant in respect of the daughter so designated.

Cases referred to:

Mcunu *v.* Mcunu, 1946, N.A.C. (T. & N.), 48.

Appeal from the Court of Native Commissioner, Eshowe.

Menge President:—

This is an appeal from the Chief's judgment. The plaintiff's claim, as amplified by particulars furnished to the Native Commissioner, was for six head of cattle lent by plaintiff's late father to defendant's late father for dowry purposes. The defendant, according to the Notice of Hearing—there being no written record on the file—denied the loan but before the Native Commissioner he pleaded that, in any event dowry was paid for plaintiff's father out of the estate of his (defendant's) father—in other words, that there was a set-off.

The Chief gave judgment for plaintiff.

Before the Native Commissioner evidence was given by an elderly relative of the parties (who are cousins, their late fathers having been full brothers of one house) and by one other person who simply said he knew nothing about the case. This evidence confirms the loan. It is alleged to have taken place more than 70 years ago. But it also confirms the defendant's plea of set-off in as much as the former of these witnesses stated that plaintiff's father received 8 head of cattle from the estate to which the defendant was heir.

At the close of plaintiff's case the defendant's attorney asked for absolution from the instance.

This the Native Commissioner granted by upholding the appeal and altering the Chief's judgment to one of absolution from the instance.

The Native Commissioner's judgment is justified on the evidence; but is seems that in any event plaintiff has not set out a valid claim. He alleged in his particulars of claim that a half-sister of his, Nomahezu, had been indicated as the source or refund of the loan, but he did not allege that this girl had been married and that dowry had been paid for her. It seems that the position is that under the custom of *ukuwenzelele* which is here in point, where as in this case there is no special agreement for the refund of the loan out of current assets, but where a daughter has been indicated as the source of refund, it is premature to sue for recovery of the loan until *lobolo* has been received for the girl [see Mcunu *v.* Mcunu, 1946 N.A.C. (T. & N.) 48]. Consequently, in order to render the claim actionable, it would have been necessary for the plaintiff to allege and prove that the girl designated as the source of refund had married and that *lobolo* had been received for her.

The appeal is dismissed with costs.

Ashton, Permanent Member:—

I would have thought that there should be a difference in approach when absolution is sought before a defendant closes and when absolution is asked for after a defendant closes. But as the same decision would probably have been reached if absolution had been sought after defendant had closed, I feel I should concur in the conclusion of the majority.

Botha, Member: I concur.

For Appellant: S. H. Brien.

For Respondent: H. Kent.

NORTH-EASTERN NATIVE APPEAL COURT.

LETSOALO *v.* MODIBA.

N.A.C. CASE No. 2 OF 1959.

PRETORIA: 3rd June, 1959. Before Menge, President, and Ashton and Marais, Members of the Court.

CONFLICT OF LAWS.

Native law not applicable if effect is to alter basis of claim.

Summary: Plaintiff sued defendant for transfer of portion of certain immovable property on the basis of an agreement of joint purchase of the property. The defendant denied the agreement The evidence disclosed that there was no such

agreement but that the late father of plaintiff had, in consideration of financial aid, promised that defendant's mother would obtain a share in the property. The Native Commissioner found for plaintiff on the basis that in Native law the plaintiff as heir to his father was bound to carry out the latter's obligations.

Held: On the pleadings there was no room for the application of Native law and the latter cannot be applied if the effect is to alter the basis of the claim.

Appeal from the Court of the Native Commissioner, Bochum. Menge, President:—

Plaintiff sued defendant for transfer of certain property held by defendant under title. He alleged that the land "was acquired jointly by the plaintiff and the defendant for the sum of £100 of which sum the plaintiff and the defendant each contributed the sum of £50" and that therefore plaintiff is the lawful owner of a half-share and entitled to transfer of a portion equivalent to one-half. He claimed at first "Transfer of such portion . . . equivalent to one-half thereof as the . . . Court may order". Apparently this is a claim for a specific geographical portion, otherwise the description of the portion would be a mere tautology. This also seems to have been intended for later in the proceedings an amendment of the summons was granted adding the following prayer:—

> "or alternatively, in the event of the Honourable the Minister of Native Affairs refusing to permit a subdivision of the aforesaid property, but not otherwise, for rransfer to plaintiff of a one-half share of and in such property".

The defendant admitted being the registered owner of the land, but denied the joint acquisition and plaintiff's right to a share of the land.

According to the evidence of plaintiff—if one overlooks that despite objection by defendant's attorney a great deal of it is inadmissible hearsay—it appears that the defendant is the oldest surviving son of one Isaac, the brother of the plaintiff's widowed mother. The late Isaac was one of fifty-two co-purchasers for whom the farm, Harrietswish, in the district of Pietersburg, was held in trust by the Minister of Native Affairs. In 1955 the Minister donated individual title of their separate, surveyed shares to these fifty-two persons, and the defendant took the place of his father, since deceased, as a donee. The late Isaac had contributed £50 towards the purchase of his interest in the farm and the plaintiff's mother contributed another £50 on the explicit understanding that she would be a co-owner and entitled, as such, to her share of the farm. The defendant refused to share his portion of the farm with plaintiff, but is agreeable to refund to plaintiff's mother what he refers to as a loan of £50. The latter has for some time had the use of portion of plaintiff's land.

The Native Commissioner granted judgment for plaintiff in terms of the alternative prayer.

The defendant now appeals on a number of grounds, but only one of these needs to be considered, namely, No. 9. It reads:—

> "That the Court erred in finding that the agreement, alleged by plaintiff, was proved by the evidence and was binding on defendant."

Actually it does not seem that the plaintiff's summons discloses a valid cause of action, and that the judgment given—or any judgment for plaintiff—is possible thereon. The summons is very badly framed. It is clear from the alternative prayer that the Minister of Native Affairs has—at least in the opinion of the plaintiff—the right to prevent transfer of a defined share

from defendant to plaintiff irrespective of the defendant's attitude to the claim. That being so, there cannot be any claim on the defendant to transfer a defined portion of the land in the absence of an allegation that he is free to do so. Again, as far as the alternative prayer is concerned the Native Commissioner understood this to be a separate prayer which he could grant if he felt it was not possible or just to grant the main prayer. But the alternative prayer asks for an order of transfer of an undivided share *only in the event of* the Minister refusing to permit subdivisional transfer; and there is no allegation that the Minister has so refused. Consequently the judgment which the Native Commissioner gave was not competent, not having been asked for.

It may be that the amendment of the summons was not intended to constitute an additional alternative prayer as the Native Commissioner understood it, but a single prayer for an order in the alternative. But as such it would be too vague for there is nothing to show whether the Minister has been approached in the matter and, if he has not, by whom and how he is to be approached.

Lastly, there is nothing in the summons to indicate why the costs of survey and of transfer should be borne by the defendant, and in terms of the judgment claimed in the prayer (or prayers) he would be condemned to do so in absence of a tender by the plaintiff.

However, even if these contentions as regards the cause of action are not correct, it is clear that plaintiff has failed to prove what he alleged in his summons was an agreement between plaintiff and defendant and consequently on these papers defendant cannot be held liable.

The Native Commissioner states that he decided the case according to Native law and custom. According to his reasoning he considered that the late Isaac, conscious of his Native law responsibiliy to support his sister, had decided to admit her as a co-purchaser, and that the defendant, his son and heir in Native law, was bound to recognise this obligation. That may or may not be good Native law, but it is certainly not the basis of the plaintiff's claim. The plaintiff did not claim on the basis that the defendant, as his late father's heir, was bound in Native law to honour his father's obligations towards his sister and make her son a co-purchaser of his portion of the farm. His basis is a contract between the plaintiff and the defendant; that is what the defendant pleaded to and that is, therefore, what plaintiff had to prove; for the court must decide the dispute on the pleadings—not on the evidence. On the pleadings there was no room for the application of Native law, and the latter cannot be applied if the effect is to alter the basis of the claim.

The appeal is upheld with costs and the judgment of the Native Commissioner altered to read: "Absolution from the instance with costs".

It is necessary to remark that the Clerk of the Native Commissioner's Court wasted a considerable amount of time and stationery in laboriously typing copies of pages and pages of correspondence remotely connected with the conduct of the case but not forming part of the record at all.

Ashton, Permanent Member: I concur.

Marais, Member: I concur.

For Appellant: Adv. A. S. v. d. Spuy, instructed by Slabbert, Roos & Chaitow.

For Respondent: Adv. K. L. Simons, instructed by Meyer, Hirschmann & Susher.

NORTH-EASTERN NATIVE APPEAL COURT.

LINDA *v.* SHOBA.

N.A.C. CASE No. 3 OF 1959.

PRETORIA: 5th March, 1959. Before Menge, President, Ashton and Eaton, Members of the Court.

NATIVE CUSTOM.

Lobolo—claim for payment not possible if no customary union or marriage took place.

Summary: Plaintiff sued for payment of 15 head of cattle as *lobolo* for his ward who was living with the defendant, but in respect of whom no customary union or marriage had been concluded. Before the Native Commissioner the issue was who the girl's rightful guardian was. The Native Commissioner granted absolution from the instance and the plaintiff appealed on the facts. The Court *ex mero motu* considered the validity of the claim.

Held: It is in the nature of *lobolo* that payment thereof cannot be claimed save in respect of a customary union or marriage.

Appeal from the Court of Native Commissioner, Piet Retief.

Menge, President:

In this action plaintiff sues for 15 head of cattle. In his summons, as amplified by further particulars, he makes three allegations:—

(*a*) That the cattle represent *lobolo* which the defendant undertook to pay. Defendant denies this undertaking;

(*b*) that plaintiff is the person entitled to receive the *lobolo* in that the woman concerned is his sister and he is the heir of his late father's great house. Defendant disputes this;

(*c*) that defendant and the woman are living together, no marriage or customary union having been concluded. This is common cause.

The Native Commissioner heard evidence for both parties, who were represented, and thereupon decreed absolution from the instance. According to the reasons for judgment the Native Commissioner considered the point in issue to be whether plaintiff was entitled to the dowry or, as the defence had contended, his half-brother of the second house to whom (according to defence witnesses) the mother of the girl concerned—a fifth wife—had been affiliated. In an ably prepared statement of his reasons the Native Commissioner held that in all likelihood the half-brother was the person to whom the *lobolo* should go. The plaintiff now appeals on the facts.

It is not necessary to deal with the facts, for if the appellant's contention were correct that the plaintiff is the person entitled, as against his half-brother, to receive the *lobolo,* this would not avail him as his summons does not disclose a cause of action.

Liability for the payment of *lobolo* can only arise if a customary union (or marriage) has taken place. The essentials of a customary union are—

(1) the consent thereto of the guardian and the intended husband;

(2) agreement as to the amount of *lobolo* to be paid; and

(3) the formal handing over of the girl.

In this case, even if there was some agreement as regards the *lobolo* which would have to be paid, the first and third essentials are missing. This is confirmed by the evidence. The plaintiff's case is that the defendant "stole" the woman. On the pleadings it is clear that there was no marriage or customary union. Consequently no claim for the payment of *lobolo* can arise at all. To hold otherwise would be to sanction a contract whereby a person can, in return for a few head of cattle, acquire the right to co-habit with a woman without entering into any form of marriage, which would be completely *contra bonos mores*. It is possible that the plaintiff or his half-brother (whoever may be the girl's guardian) may have a claim for damages, for instance in respect of seduction; but he has no claim for the payment of any *lobolo*.

Consequently the judgment is correct and the appeal is dismissed with costs.

Ashton, Permanent Member:—

Plaintiff sued defendant in a Native Commissioner's Court in the following terms:—

". . . 2. Plaintiff is entitled to receive the *lobolo* cattle for Sabet Linda.

3. Defendant has now taken Sabet as a wife and refuses to pay *lobolo* for her".

4. The *lobolo* for Sabet is 15 head of cattle.

Wherefore the plaintiff prays for judgment against the defendant for payment of 15 head of cattle".

Defendant asked for further particulars—was there in existence a customary union and if so, who gave consent and who fixed the *lobolo* at fifteen head.

Plaintiff replied that defendant had taken Sabet a year previous and was living with her as her husband and said that defendant had undertaken to pay the *lobolo*.

Defendant objected that plaintiff's further particulars were not full answers to the questions asked and plaintiff replied that it was for the Court to decide if there was a customary union and that defendant had taken Sabet without permission of a male person but with Sabet's consent only and he averred that plaintiff and defendant had arranged the *lobolo* on their own.

Defendant then pleaded that plaintiff was not entitled to Sabet's *lobolo;* that he was living with her but that there was no customary union between them; that he had not consulted plaintiff nor undertaken to pay *lobolo* to him and that plaintiff was not entitled to Sabet's *lobolo*.

The issue was then joined on these pleadings and the greater part of the evidence was devoted to deciding who was the person entitled to Sabet's *lobolo*. It was contended for defendant that the house to which she belonged was affiliated to the house of the second wife whose heir was Gobiyana while for plaintiff is was contended that as he was the heir to the *indhlunkulu* and the house to which Sabet belonged was heirless, he, plaintiff, became the heir to her house and so was entitled to the *lobolo*.

On the evidence before him the Native Commissioner said in his reasons for judgment that the issue was not very clear to him but as there was a *possibility* of there having been an affiliation he felt he could only grant an absolution judgment. But he lost sight of the apportionment of the onus to prove the existence of an affiliation or otherwise and the necessity for clear proof of a division of a kraal into sections and the affiliation of junior to senior houses.

In my view the Native Commissioner decided wrongly on the evidence in connection with the issue canvassed before him but the learned President has raised the question whether the pleadings disclose a cause of action in that they do not allege that a vaild customary union was entered into. Assuming that plaintiff's action against defendant presupposes his consent to a union, I think that in fact a customary union did exist at the time the summons was issued. But there is the clear statement of plaintiff in his particular claim that defendant had taken Sabet without the consent of a male person and I fear I must accept the learned President's view that there was no cause of action for the Native Commissioner to try. It is to be deprecated that at the close of the correspondence of the parties' attorneys suitable amendments to the pleadings were not made and that the issues between the parties were not properly before the Native Commissioner.

With regret, then, I concur in the judgment of the learned President and Member that the appeal be dismissed with costs.

R. L. Eaton, Member: I agree with the judgment of the President.

For Appellant: R. D. Kneen.

For Respondent: Adv. I. W. B. de Villiers, instructed by Smit & Vorster.

NORTH-EASTERN NATIVE APPEAL COURT.

GUMEDE *v.* MKWANAZI.

N.A.C. CASE No. 5 OF 1959.

ESHOWE: 21st April, 1959. Before Menge, President, Ashton and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—Default judgment by Native Commissioner without trial not competent—Pleadings—Issues to be formulated

Summary: Where a Native Commissioner had entered a default judgment dismissing an appeal from a Chief's Court, and where the claim as set out in the Chief's written record disclosed no cause of action whatsoever.

Held: That the Native Commissioner's judgment was irregular.

Statutes referred to:

Section *twelve* (5) of Act No. 38 of 1927.
Section *twelve* (4) of the Regulations for Chief's and Headmen's Courts—Government Notice No. 2885 of 1951.
Rule 41 of the rules for Native Commissioners' Courts.

Appeal from the Court of Native Commissioner, Matubatuba.

Menge, President:—

This is a somewhat unusual case. It originated before a Chief. The Chief's Written Record is not among the papers; but according to the Notice of Hearing (N.A. 503) the particulars of the case were as follows:

"CLAIM: Eight head of cattle being *lobolo* paid for Nokuphulas' mother.

DEFENDANT'S REPLY TO CLAIM: Defendant admits four head of cattle.

JUDGMENT OF THE CHIEF: In favour of plaintiff 8 head of cattle and costs."

The Chief gave judgment on the 29th March, 1957, and the appeal was noted on the 24th May, 5 days late. No doubt the Court could have condoned the late noting under section *nine* (3) of the regulations for Chief's and Headman's Civil Courts, but that aspect never came up for consideration. The hearing of the appeal was set down for the 10th September, 1957. For same reason which is not apparent the case was not heard on the 10th. On the 11th, however, according to the record, the parties appeared and the case was postponed by the Clerk of the Court in the absence of the Native Commissioner to the 22nd January, 1958. On the 22nd January the defendant was unable to appear because of swollen rivers according to a telephone message received that day. The case was then further postponed to the 29th May, costs of the day being awarded to plaintiff.

On the 29th May the Clerk of the Court called the case under the provisions of Rule 41 (1) of the Native Commissioners' Courts rules and, there being no appearance on behalf of the defendant, judgment was promptly entered by the Native Commissioner by default and without hearing any evidence.

On the 12th June the defendant asked for rescission of this default judgment; but this was refused with costs when the matter came up for hearing on the 13th December, 1958 before a different Native Commissioner, on the grounds that the defendant did not advance any satisfactory explanation of his default. In his affidavit he merely stated that he arrived late on the day of hearing, viz. the 29th May. The appeal now before us is against this refusal to rescind the default judgment. It is brought on the ground that the refusal is unreasonable.

Whilst the defendant's reasons for not appearing may not be altogether satisfactory, they do indicate that he was not wilfully in default. The defendant's affidavit also does not set out any grounds upon which defendant claims to have prospects of success on a trial of the action. The defendant did not have qualified assistance in drafting his affidavit, but, whatever the position may be as regards the prospects of success, it is only too obvious that the default judgment was quite irregular. This was conceded before us by Mr. Kruger on behalf of the appellant.

In the first place there was no cause of action before the Court. The claim does not set out any legal basis upon which the defendant is obliged to pay *lobolo* cattle to the plaintiff, nor do the Chief's reasons assist in this respect. It was the duty of the Native Commissioner before giving judgment on the appeal to find out from plaintiff what it was all about, and to record the legal basis of plaintiff's claim, if there was any. Secondly, there is no provision at all for the default procedure which was adopted. In an appeal from a Chief's Court it is essential that there be a hearing and trial of the action before judgment can be granted. That is clear from section *twelve* (5) of the Native Administration Act, 1927, and from section *twelve* (4) of the regulations for Chief's' and Headmen's Civil Courts.

The appeal is upheld with costs. The Native Commissioner's judgment is set aside and for it is substituted: "The judgment dated 29th May, 1958 is hereby rescinded". This Court further directs that the applicant must prosecute the appeal within three months of the date of this order.

Ashton, Permanent Member: I concur.

Botha, Member: I concur.

For Appellant: H. Kent.

For Respondent: H. Kruger.

NORTH-EASTERN NATIVE APPEAL COURT.

GUMBI *v.* GUMEDE.

N.A.C. CASE No. 11 OF 1959.

PIETERMARITZBURG: 14th May, 1959. Before Menge, President, Ashton and Cornell, Members of the Court.

EVIDENCE.

Adultery in Native law—corroboration only required in face of superior defence evidence.

Summary: In an action for damages for adultery in Native law, the plaintiff gave evidence of having caught the defendant in very compromising circumstances. Defendant closed his case without leading evidence, and, judgment having been given against him, appealed on the ground that there was no corroboration of the plaintiff's evidence.

Held: The rule that if evidence is given which is acceptable as *prima facie* proof of adultery, no corroboration is required unless at least equally cogent evidence is given in denial, is applicable to cases decided under Native law and custom.

Cases referred to:

Qata *v.* Nyubata and Another, 1951, N.A.C. (S.), 290 followed.

Appeal from the Court of Native Commissioner, Camperdown.

Ashton, Permanent Member:—

In a Chief's Court plaintiff sued defendant for a beast or £5 as damages because of his having committed adultery with his wife. Although defendant denied having committed adultery the Chief gave judgment for plaintiff for £5 and costs.

Thereupon defendant appealed to the Court of Native Commissioner against the judgment but his appeal was dismissed with costs and now he has appealed to this Court on the grounds that the evidence was insufficient to prove the adultery, that certain evidence allowed was inadmissible, that plaintiff's evidence was not sufficiently corroborated and that the finding of a coat at the place where the adultery took place was not a "catch".

Defendant, through his attorney, was content to plead simply that he denied "the allegation of adultery", to cross-examine the plaintiff and his one witness and to address the Court. He called no witnesses and did not support the denial contained in his plea

by giving evidence himself. The evidence for plaintiff stands uncontradicted and it is difficult to find any good cause for the judgment to be challenged.

Plaintiff, who is described by the Native Commissoner as an absolutely honest and truthful witness, said in evidence that after searching in vain for his wife one evening he hid near a path he suspected his wife and defendant would come along and he described what they did when his suspicion became fact. Here there was no inadmissible or hearsay evidence and as it was uncontradicted on oath it must be accepted as fact. It has been suggested that a husband may not give evidence as to his wife's adultery but in a civil action against the adulterer there is no authority for such a suggestion, whatever may be the position in a criminal case.

In so far as the degree of proof of adultery is concerned and the question whether corroboration is essential, a study of the case Gates *v.* Gates 1939 A.D. 150 at pages 154 and 155 dealing with adultery charges reveals the following illuminating passages:—

> "Now in a civil case the party on whom the burden of proof (in the sense of what Wigmore calls the risk on non-persuasion) lies, is required to satisfy the Court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the Court's mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond reasonable doubt is required but attempts to define with precision what is meant by that usually lead to confusion. Nor does the law, save in exceptional cases such as perjury, require a minimum volume of testimony. All that it requires is testimony such as carries conviction to the reasonable mind . . . The requirement is still proof sufficient to carry conviction to a reasonable mind but the reasonable mind is not so easily convinced in such cases (where criminal or immoral conduct is concerned) because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal".

In the Court below the Native Commissioner was satisfied that plaintiff was telling the truth and he found corroboration of his story. The defendant gave no evidence to contradict it; so that, even if there had been no corroborative evidence, he would have been justified in reaching the conclusion he did.

The appeal must be and is dismissed.

Menge, President: I concur.

The plaintiff's evidence is *prima facie* proof against defendant of the commission of the delict. The question of corroboration did not arise in the absence of any denial under oath by the defendant,—not that a denial would necessarily require corroboration of the plaintiff's story. That is the ordinary rule of evidence which has been applied by the Supreme Court in divorce suits [see also Montgomery's recent case reported in 1956 (2) S.A. 282] and it has been applied in the Cape to cases under Native law and custom [see Qata *v.* Nyubata and Another, 1951 N.A.C. (S), 290].

Cornell, Member, I concur.

For Appellant: Adv. M. J. Strydom, instructed by C. Raulstone & Co.

Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

NGWENYA d/a NGWENYA *v.* **ZWANE.**

N.A.C. CASE No. 24 OF 1959.

PRETORIA: 4th June, 1959. Before Menge, President, Ashton and Marais, Members of the Court.

PRACTICE AND PROCEDURE.

Locus standi in judicio—*Spoliatory action—Native law not applicable.*

Native Custom.

Widow of customary union—Assistance in disputes with her late husband's people.

Summary: In an application for a spoliation order brought by a widow of a customary union she was assisted by her father. Exception was taken that she had no *locus standi in judicio* because in Native law only her late husband's heir, her guardian, had the status to provide the necessary assistance. The Native Commissioner upheld this exception. On appeal it was contended that Native law has no applicaiton by virtue of the fact that a form of action had been adopted —an application for a spoliation order—which was not known to Native law.

Held: Native law has no application, not because of the procedure adopted, but because the claim is not dependent on or governed by Native law.

Held further: That, in any event, a widow is properly assisted by the head of her own group in disputes with her husband's group.

Statutes referred to:

Section *eleven* (3) of Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Ermelo.

Menge, President:—

This matter arises out of an application for a spoliation order which was dismissed with costs. The Court below had before it an affidavit in which the applicant (the present appellant), a woman, states that on or about the 8th April, 1958 she was in undisturbed possession of certain furniture and that the respondent unlawfully and against her will removed this furniture; and she asks for an order that the respondent restore it. In the heading to the application and the accompanying affidavit it is stated that the applicant is assisted by her father, but no allegation to this effect appears in the body of the affidavit.

The Assistant Native Commissioner granted a rule *nisi* and thereupon the respondent filed his replying affidavit. This affidavit does not deny that the plaintiff is assisted by her father; in fact the heading adopts the citation that she is so assisted. Nor does the respondent deny the applicant's allegations. His case is that

the applicant is the widow of a Native customary union of his late younger brother and that the furniture in question belongs to respondent's elder brother. That, of course, is no answer to the applicant's claim. His affidavit does not even establish that he has any rights to the furniture. But when the matter was heard

on the return day the respondent's legal representative took the stand that the applicant had not *locus standi in judicio* because it was not alleged in her affidavit that she was assisted, and that her father can in any event not be her guardian as the respondent's elder brother is her guardian in Native law.

On behalf of the applicant is was contended in the Native Commissioner's Court as regards the first point, that there was no need to make such an allegation the more especially as the applicant's *locus standi* had not been challenged in the respondent's reply. It would have been more proper for the applicant to give *prima facie* proof of the assistance by mentioning the fact in her affidavit; but as assistance has been alleged and the allegation has not been denied it seems that the objection must fail [see Nyele *v.* van Coller N.O., 1948 (1) P.-H.F. 39, where Mr. Justice Murray, as he then was, in somewhat similar circumstances dismissed the objection "particularly as the respondent did not specifically deny such assistance"].

As regards the second point, the only one relied on by Counsel before us, it was contended that Native law had no application because the procedure adopted—a spoliatory action—is not known to Native law. Put in this way the proposition may not be strictly correct because it is not the procedure employed but the nature of the legal right which determines capacity [see section *eleven* (3) of the Native Administration Act, 1927]. But the legal right relied on here is lawful and undisturbed possession and it is somewhat difficult to conceive how Native law can ever be said to have any application in a *mandament van spolie*. Of course, if it can then the woman has no *locus standi* unless assisted. But, as the Permanent Member in his judgment points out the applicant's rights are in this case probably not dependent on Native law.

However, even if they were so dependent, it is wrong to contend that only the widow's late husband's heir can provide the necessary assistance. The reasons for judgment which must be furnished in terms of the rules have not been furnished but one gathers from the written judgment that this is the ground upon which the respondent's objection to the applicant's *locus standi* was upheld. In Native law when a widow is involved in trouble with her husband's people—as seems to be the case here—it is her father or his heir who, as the holder of the dowry paid for her, must protect her in an action which is dependent on Native law. Consequently for the purposes of this action, the applicant was sufficiently assisted to give her *locus standi,* even if one holds that her right is dependent on Native law.

The appeal must succeed; but there are other matters calling for comment in these proceedings. According to the headings of the various documents which have been filed they took place "In die Naturellekommissaris Hof . . ." That is the only consideration which enables this Court to assume appellate jurisdiction. The judicial officer who presided signed himself as "Magistrate/Landdros", "Bantu Affairs Commissioner" and again, under the judgment, as "Magistrate". In none of these capacities has he jurisdiction. As the law stands at present only a Native Commisioner has jurisdiction. Then again, in the applicant's affidavit the parties are described as a "Bantoevrou" and "'n manlike Bantoe"; but in order to enable them to have their dispute heard in a Court of Native Commissioner it is necessary to allege that they are Natives. No doubt these are mere omissions, and this Court proposes to let them pass, but they should be avoided in future.

The appeal is upheld with costs. The judgment given in the Native Commissioner's Court is altered to read:—

> "Rule *nisi* confirmed with costs, subject to the applicant furnishing proof by affidavit that the parties are Natives".

Ashton, Permanent Member:—

I agree that the appeal must be upheld and that the spoliation order asked for must be granted. I am in some doubt as to whether the common law "mandament van spolie" has its exact counterpart in the Native law system but even if there is no counterpart the judgment is still the right one. Applicant was a widow and presumably an adult—to cure any defect in her status that there might be she took the precaution of citing her father as assisting her in the application—and she had a common law right against the world not to be despoiled of the possession of the articles listed in her affidavit. She was, therefore, entitled to have the articles restored to her possession and this is what the judgment of this Court effects.

Marais, Member: I concur.

For Appellant: Adv. A. S. v. d. Spuy, instructed by Jackson & Joubert.

For Respondent: Adv. R. van Rooyen, instructed by Bekker, Brink & Brink.

NORTH-EASTERN NATIVE APPEAL COURT.

MPANZA *v.* MASHININI and ANOTHER.

N.A.C. CASE No. 31 OF 1959.

PRETORIA: 3rd June, 1959. Before Menge, President, Ashton and Marais, Members of the Court.

PRACTICE AND PROCEDURE.

Spoliatory action—By "Presiding Minister" of a Church—Whether applicant has locus standi in judicio.

Summary: Applicant sued for a *mandament van spolie* to be re-instated in the possession of a church building and a manse. Exception was taken to his *locus standi* on the ground that, in accordance with the Supreme Court decision in Mpunga *v.* Malaba, 1959 (1) S.A. 853, the applicant has no personal interest in the suit apart from that which he has as a mere servant of the chuch. The properties belonged to the church and the applicant had described himself as the "Presiding Minister" of the church; but the question as to who had authority in matters of the church was in dispute.

Held: The applicant had a purely personal right to the manse; but in any event he had *locus standi* to sue as it had not been shown that he was merely acting as a servant of any church body.

Cases referred to:
Mpunga *v.* Malaba, 1959, (1) S.A. 853, distinguished.

Appeal from the Court of Native Commissioner, Bethal.

Menge, President:—

The appellant was the applicant in the Native Commissioner's Court for a spoliation order. His case according to his affidavit is this: He is the "Presiding Minister of the Ethiopian Church of South Africa". As from the 11th February, 1959 he was in lawful, undisturbed possession and control of a church building and a dwelling-house belonging to the said church. On the 21st February he went away on duty, having locked the dwelling and retained the key, and leaving certain of his belongings in the dwelling; and between the 21st February and the 18th March the respondents moved into these premises. The first respondent was in the dwelling to which a new lock had been fitted and the second respondent had possession of the key of a lock which had been affixed to the church building. The applicant asked that his possession be restored and that the rule *nisi* serve as an interim interdict.

The rule *nisi* was granted and thereafter the respondents filed replying affidavits. In these they do not deny any of the allegations made by the applicant save that they deny that he is the presiding minister of the church. Their case is (*a*) that the applicant has no *locus standi* to bring the application and (*b*) that, in as much as the executor of the late "registered owner" of the building had authorised them to take possession thereof in 1958, they and not the applicant are entitled to occupation.

The latter allegation is of course irrelevant and is no reply to the application; but in regard to the former the respondents' reasoning is "That the said church has no legal personna (*sic*), as the said church has not been recognised by the Department of Native Affairs".

On the return day evidence was given on behalf of the respondents by one Melrose Seshube who claims to be "Hoof in die hele land" of the "Ethiopian Kerk". He went on to say that no single person has the right to "besluit oor die geboue" and "Die Kerk word beheer deur Rade en Trustees". Under cross-examination, however, he stated that there is a split in the church and that two groups, to one of which he and the respondents belong, are contending for authority, and that a case is now pending in the Supreme Court to decide which group is to be in authority.

No further evidence was tendered. Thereupon the Native Commissioner dismissed the application, holding that the applicant had no *locus standi* to bring the action. He relied on the case of Mpunga *v.* Malaba 1959 ((1) S.A. 853.

The applicant now appeals on grounds which, briefly stated, contend that he did have rights over and above the interest which he has as a minister or servant of the church. This is one aspect, but there is another. In Mpunga's case, where the broad facts were very similar, the Court refused the application because on the applicant's own showing (to quote from page 862 of the report) the "user of the key, rested clearly, on the evidence, with the Deacon's Court", a properly constituted body which had entrusted the applicant with the care of the key. and which the Court accepted as lawfully entitled so to dispose of the key. Consequently, on the evidence, the applicant was merely a servant of a master and had no rights above those which he had *qua* servant.

But in the present case there is nothing to show that the applicant is merely the servant of a church body. Apart from the fact that, as counsel argued before us, there certainly seems in regard to the residence to be a personal right over and above what would be held as a mere servant of a principal. there is

nothing to show that the applicant has a principal. In his application he alleges that *he* has control. The evidence adduced does not establish that any other person or body has control. The finding of the Native Commissioner that "according to the constitution of the Ethopian Church of South Africa, buildings of the church at Leslie are controlled by a church council" is unjustified. The witness did not mention the *Ethopian Church of South Africa* in his evidence; but even if one assumes that he meant that church it is clear that, whatever may have been the position at one time, there is no longer a controlling authority —not until the courts have decided the dispute. Besides being unjustified on the evidence the finding is quite vague. It does not necessarily convey that the exercise of control by the applicant is in any way unconstitutional. The further statement by the Native Commissioner that "There was allegation in the pleadings that plaintiff sued in a representative capacity" is wrong. The applicant merely described himself, quite unnecessarily, as a minister of the church, but he did not say or convey he was suing in a representative capacity; and the defendants emphatically deny that he represents the church.

As the only defence to the application fails the applicant should have succeeded. The appeal is upheld with costs and the judgment of the Native Commissioner altered to read: "Interim order confirmed with costs as prayed".

Ashton, Permanent Member:—

It seems to me that all that is necessary for the correct decision of this case is to find out whether applicant was a servant of the Church or not and whether he "occupied" the buildings as such a servant for the church or not. If he did exercise his rights as a servant of the Church for the Church then in conformity with the ruling in Mpunga's case it was the Church and not he who had the right to institute proceedings.

In his affidavit applicant claimed to be "a Presiding Minister of the Ethopian Church of South Africa" and to have possession and control of the premises in succession to his predecessor in office who had occupied them for the previous six years. He made no claim as did the plaintiff in Mpunga's case to the "use of the key for the purposes of control of the building" which "was entirely at the discretion of the Deacons' Court, whose orders the plaintiff had to obey".

In the case for the respondents there was a denial that applicant was the Presiding Minister of the Church because the Church was not a legal *persona* as it had no Departmental recognition and it was contended that consequently application had no *locus standi*.

The respondent sought to show by evidence that by the Church's constitution the possession and control of its property vested in a "Kerkraad" or General Board of Trustees but the Constitution was not put in and all that was done was to call the self-styled "Hoof van die Kerk in die hele land" who testified to what in his opinion was the content of the constitution on the subject.

It is clear that the respondents' attack on the applicant's *locus standi* failed and as the case was decided on that point, the appeal must succeed.

Marais, Member: I concur.

For Appellant: Adv. J. Broude, instructed by Ferreira & van der Merwe.

For Respondent: J. L. Taitz, of Sherman, Taitz & Sacks.

SOUTHERN NATIVE DIVORCE COURT.

MAHLANGENI *v.* MAHLANGENI.

N.D.C. CASE No. 473 OF 1958.

KINGWILLIAMSTOWN: 2nd and 4th March, 1959. Before Balk, President.

PRACTICE AND PROCEDURE.

Variation of Order of Court as to custody of child—Competent for viva voce *evidence to be adduced to substantiate general allegations contained in affidavits in support of application.*

Summary: In an application for the variation of an order of this Court as to the custody of a child, the respondent's attorney applied *in limine* to have paragraph 11 of the applicant's affidavit struck out in that the allegations contained therein were merely hearsay and vague and embarrassing in the extreme. Respondent's attorney further objected to evidence being adduced in support of the general allegations contained in this paragraph.

Held: That, the leading of *viva voce* evidence in support of applications to this Court for the variation of an order as to the custody of a minor child is not only quite competent but imperative.

Referred to:

Mauerberger *v.* Mauerberger, 1948, (3) S.A. 731 (C.P.D.).
O'Brian *v.* Brooke, 67 P.H., B. 17 (E.D.L.D.).

Balk (President):—

In limine the attorney who appeared for the respondent, applied to strike out paragraph 11 of the applicant's supporting affidavit on the ground that it was merely hearsay and vague and embarrassing in the extreme. He also objected to the applicant's adducing evidence. He referred to Rule 5 of the Rules of this Court. These rules are published under Government Notice No. 2888 of 1951, as amended by Government Notice No. 628 of 1953. He cited *Mauerberger v. Mauerberger,* 1947 (3) S.A. 731 (C.P.D.) and asked this Court to hold that the *ratio decidendi* there applied here. He contended that any evidence allowed to be led must be likened to a replying affidavit and that the applicant could not come with general allegations. He further contended that the applicant's complaint should have been set out fully in his supporting affidavit in that otherwise the respondent would be severely prejudiced as she would not know what case she had to meet until the evidence was given. Here he referred to *Beck on Pleading in Civil Actions* (Second Edition). Without calling on the attorney who appeared for the applicant, I allowed evidence to be adduced on the allegations contained in paragraph 11 of the supporting affidavit and refused the application to strike out that paragraph. My reasons for so doing are as follows:—

Mauerberger's case (*supra*) is not apposite here, dealing, as it does, with Supreme Court procedure dictated by the rules of that Court. The rules of this Court are entirely different. Rule 5 (1) provides that all evidence is to be given *viva voce,* except as is otherwise provided in the Rules. Rule 35 deals with applications. It does not require an application of the nature in question to be supported by an affidavit nor do any of the

other rules. Consequently the leading of *viva voce* evidence is not only quite competent, but imperative. The Rules were framed to meet the needs of a people, who, in general, still incline towards the primitive. That this is so is apparent from the procedure permissible under Rule 21 (7) (ii) viz., a defendant may be allowed to enter a plea for the first time at the hearing of the action on such terms as to adjournment and costs as may be just. Here we have a similar situation. The applicant asked for leave at the hearing of the application to adduce *viva voce* evidence. I considered that he should be accorded such leave for the issues involved were in dispute and could not otherwise be properly determined. In any event the application could not be disposed of by affidavits, see *O'Brian v. Brooks,* 67 P.H., B. 17 (E.D.L.D.). Paragraph 11 of the applicant's supporting affidavit served a useful purpose in that it set out the issues involved. Accordingly, I granted leave for *viva voce* evidence to be adduced and refused the application to strike out paragraph 11. It was open to the respondent's attorney at this stage to have applied for an adjournment and costs but he did not do so.

For Applicant: Adv. T. M. Mullins, Grahamstown.

For respondent: Mr. E. Heathcote, Kingwilliamstown.

SOUTHERN NATIVE APPEAL COURT.

MNGCANGCENI *v.* NDLANGISA.

N.A.C. CASE No. 44 OF 1958.

UMTATA: 26th January, 1959. Before Balk, President, Yates and Watling, Members of the Court.

PRACTICE AND PROCEDURE.

Notice of Appeal invalid in so far as grounds of appeal not clearly and specifically stated—Court will not countenance taking of Mqoba *or* Nqutu *beast against owners consent. Kraalhead responsibility for torts of inmate—tort feasor must be joined with kraalhead even where the latter is sued on a counterclaim.*

Summary: Plaintiff sued defendant for £48 as damages in respect of wrongful removal and slaughter of a certain ox owned by him, and defendant counterclaimed for a *mqoba* beast or its value, £10, plus five head of cattle or their value, £50, for the seduction and pregnancy of his daughter.

Held: That Notice of Appeal was invalid in so far as the first three grounds were concerned as it did not comply with Rule 7 (*b*) of the Rules of this Court in that those grounds were not clearly and specifically stated.

Held further: That the Native Commissioner's finding for plaintiff on the claim in convention and his dismissal of the counterclaim cannot be said to be wrong, firstly, because, amongst the tribes that practice this custom, the court will not countenance the taking of a *mqoba* or *nqutu* beast against the owners consent, and, secondly the kraalhead cannot be sued for the tort of an inmate unless the tort feasor is joined in the action and this position also obtains where the action is brought in the form of a counterclaim.

Cases referred to:

Mlotya *v.* Mnqayi, 1 N.A.C., 182.
Mbulungwana *v.* Mbulungwana, 1929 N.A.C. (C. & O.).
Dhlamini *v.* Gatebe, 1944 N.A.C. (C. & O.), 69.
Mayekiso *v.* Sifuba, 3 N.A.C., 247.
Kawu *v.* Meji, 5 N.A.C., 85.
Sobekwa *v.* Mntuyedwa, 2 N.A.C., 136.

Appeal from the Court of the Native Commissioner at Umzimkulu.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) in the sum of £25, with costs, and dismissing the defendant's (present appellant's) counterclaim, with costs, in an action in which the plaintiff sued the defendant for £48 as damages in respect of the wrongful removal and slaughter of a certain ox owned by him (plaintiff) and in which the defendant counterclaimed for a *mqoba* beast or its value, £10, plus 5 head of cattle or their value, £50, for the seduction and pregnancy of his daughter, Bellina.

The pleadings, as amended with the leave of the Court *a quo*, read as follows:—

PARTICULARS OF PLAINTIFF'S CLAIM.

"1. The parties to this action are Natives.

2. On or about the 22nd day of April, 1957, the defendant, his wife and other women wrongfully and unlawfully removed a certain black and white ox, the lawful property of the plaintiff, from the possession of the latter without his permission or consent and this ox the defendant subsequently slaughtered.

3. Plaintiff valued the said ox at the sum of £48 and has accordingly suffered damages in this amount. Wherefore plaintiff prays for judgment against defendant for the sum of £48, with costs."

DEFENDANT'S PLEA.

"1. Paragraph 1 of the summons is admitted.

2. Paragraph 2 of the summons is denied. Defendant states that the said black and white ox was removed from plaintiff's kraal on or about 22nd April, 1957, by defendant's wife and certain other women as a *maqoba* (*sic*) beast to which the said Minah was entitled according to Native custom and defendant denies that he took part in the said removal.

3. Defendant denies that the value of the said ox is £48 as alleged by plaintiff and puts plaintiff to the proof of the allegations contained in paragraph 3 of the summons.

4. Defendant refers to his counterclaim filed evenly with this plea for delivery of 1 *maqoba* (*sic*) beast and payment of a fine for 5 head of cattle as damages and pleads that any claim to which plaintiff may be entitled for payment of the value of the said ox is set off against the amount due by plaintiff to defendant.

Wherefore defendant prays for judgment in his favour with costs."

DEFENDANT'S COUNTERCLAIM.

"1. Plaintiff/defendant in reconvention is hereinafter called plaintiff and defendant/plaintiff in reconvention is hereinafter called defendant.

2. Defendant is married according to Native custom to Minah Mngcangceni and is the guardian according to Native custom of the said Minah.
3. Defendant is also the guardian according to Native custom of his daughter Bellina Mngcangceni.
4. Plaintiff is the guardian according to Native custom of one Zipete Duma and at all material times was the kraalhead of the said Zipete and liable according to Native custom for the delicts of the said Zipete.
5. In or about June, 1956, the said Zipete wrongfully and unlawfully seduced the said Bellina and rendered her pregnant as a result of which a male child was born to the said Bellina on the 15th March, 1957, of which Zipete is the natural father.
6. By reason of the aforesaid seduction and pregnancy the plaintiff is liable to pay Minah Mngcangceni, the mother of the said Bellina one *maqoba* (*sic*) beast, and is liable to defendant for 5 head of cattle as damages for seduction."

PLEA TO COUNTERCLAIM.

" 1. Paragraphs 1, 2 and 3 of the counter-claim are admitted.
2. Paragraph 4 is denied. Plaintiff states in connection therewith that Zipete lives at his own separate kraal.
3. Plaintiff has no knowledge regarding the allegatons contained in paragraph 5 and puts defendant to the proof thereof.
4. Paragraph 6 of the counterclaim is denied.
5. Plaintiff further specially pleads that as Zipete is not a party to this action the counterclaim is bad in law and cannot be maintained against plaintiff alone and should be dismissed with costs.

Wherefore plaintiff prays that judgment on the claim in reconvention may be granted in his favour with costs of suit."

The appeal is brought on the following grounds:—

" 1. That the Judicial Officer erred in holding that Zipete was not an inmate of plaintiff/respondent's kraal at the time that Zipete seduced the girl Bellina.
2. That the Judicial Officer erred in holding that plaintiff/respondent is not responsible as kraalhead for Zipete's said tort.
3. That correct judgment should have been for delivery of one beast or its value, £25, to plaintiff/respondent on the claim in convention and for defendant/appellant as prayed in the counter claim.
4. Generally the judgment is against the weight of evidence and probabilities of the case."

For the sake of convenience I will refer to the parties as plaintiff and defendant, both when dealing with the claim in convention and the counterclaim, signifying thereby plaintiff in convention and defendant in convention.

The notice of appeal is invalid in so far as the first three grounds of appeal are concerned as they do not comply with the requirements of Rule 7 (*b*) of the Rules of this Court in that it is not stated in the notice why the Judicial Officer erred in the respects indicated in the first and second grounds nor why the correct judgment should have been as contended in the third ground. These three grounds, therefore, fall to be disregarded.

Turning to the remaining ground of appeal, the onus of proving that the defendant's wife and the other women concerned were entitled to the ox as a *mqoba* or *nqutu* beast and that the plaintiff was responsible in his capacity as kraalhead for the alleged delict by Zipete, rested on the defendant on the pleadings.

In his evidence, the defendant admitted that he had assisted in driving the ox to his kraal after it had been taken by his wife and the other women from the plaintiff's kraal and that he (defendant) had slaughtered it; and from the uncontroverted evidence for the plaintiff in these respects, it is clear that the ox was his property and was taken from his kraal against his consent. From the Assistant Native Commissioner's reasons for judgment, it is manifest that he accepted the evidence for the plaintiff that Zipete's stay at the plaintiff's kraal amounted to no more than spending an occasional night there whilst ploughing for him over a period of a month. The Native Commissioner, accordingly, found that Zipete could not be regarded as an inmate of the plaintiff's kraal. To my mind, it is difficult to say that the Native Commissioner was wrong in this finding regard being had, firstly, to the fact that, as is clear from the evidence, Zipete had his own kraal within a distance of about two miles of the plaintiff's kraal and, secondly, to the inconsistencies and discrepancies in the evidence for the defendant. But, even accepting the evidence for the defendant in so far as reasonably can be done, it seems to me that the defendant did not discharge the onus of proof resting on him on the pleadings as will be apparent from what follows. The defendant admitted under cross-examination that he did not know of his own knowledge whether Zipete had lived at the plaintiff's kraal; and his daughter, Bellina, made a similar admission in reply to the Native Commissioner in the course of her evidence. The blatant inconsistencies in the testimony of the defendant's witness, John Duma, as regards when he was at home and when he saw Zipete at the plaintiff's kraal, coupled with the fact that his testimony that he saw Zipete there in February and March, 1957, conflicts with that of the defendant and Bellina in this respect, militate against its acceptance. There remains the testimony of Malagwana Jubela and Headman Lukozi for the defendant. According to their evidence, Zipete went to live at the plaintiff's kraal in June, 1956. Malagwana does not give the date when Zipete went there and, according to the Headman, it was in the middle of June, 1956. Bellina testified that she and Zipete became lovers in June, 1956, that she first noticed her pregnancy in August, 1956 and that her child was born in March, 1957. From this evidence it is obviously uncertain when in June, 1956, Zipete seduced Bellina and when she conceived. Both these incidents might, according to the evidence, have occurred before Zipete went to live at the plaintiff's kraal. Here it must be borne in mind that Bellina was unable to say of her own knowledge when Zipete went to stay at the plaintiff's kraal and, apart from her testimony referred to above, there is nothing to show when she was seduced and fell pregnant. It follows that the defendant did not establish that Zipete was an inmate of the plaintiff's kraal when Bellina was seduced and rendered pregnant by Zipete so that the Native Commissioner's finding for the plaintiff on the claim in convention and his dismissal of the counterclaim cannot be said to be wrong. In any event, that finding and the judgment on the counterclaim cannot be said to be wrong, firstly, because, amongst the tribes which practice this custom, the Court will not countenance the taking of a *mqoba* or *nqutu* beast against the owner's consent and, where this is done and the beast is slaughtered, as was the case here, the owner is entitled to recover its value, see Mlotya *v.* Mnqayi, 1 N.A.C. 182 and Mbulungwana *v.* Mbulungwana, 1929 N.A.C. (S. & O.) 8; and, secondly, the kraalhead cannot be sued for the tort of an inmate unless the inmate is joined in the action, see Dhlamini *v.* Gatebe, 1944 N.A.S. (C. & O.) 69, on page 70; and this position remains unaffected where, as here, the action is brought in the form of

a counterclaim. In this connection, it was strenuously argued by Mr. Zietsman on behalf of the appellant that it is competent in a counterclaim of the nature in question to sue the kraalhead alone, regard being had to Rule 38 (3) of the Rules for Native Commissioners' Courts and to the judgments in Mayekiso *v.* Sifuba 3 N.A.C. 247 and Kawu *v.* Meji 5 N.A.C. 85. Although, as stated in Sobekwa *v.* Mntuyedwa 2 N.A.C. 136, which was also cited by Mr. Zietsman, the earlier decisions on the point in question were not consistent, the judgment in Dhlamini's case (*supra*) must be regarded as finally settling the matter; and where, as here, the claim is one in reconvention against the kraalhead, the plaintiff in reconvention can avail himself of the procedure prescribed by Rule 89 (2) of the Rules for Native Commissioners' Courts to have the inmate who committed the tort, joined as second defendant in reconvention.

As regards Mayekiso's and Kawu's cases, these are not apposite here, dealing, as they do, with the liability of a kraalhead for the torts of an inmate after the latter's death.

As regards the value of the ox, the plaintiff testified that it was worth £48. The only evidence indicating that it was of lesser value is that of John Duma whose testimony, however, is unacceptable for the reasons given above. Accordingly, the value of £25 placed on the beast by the Native Commissioner can also not be said to be wrong in so far as the defendant is concerned.

In the result the appeal falls to be dismissed, with costs.

Yates and Watling, Members, Concuurred.

For Appellant: Mr. F. W. Zietsman, Kokstad.

For Respondent: Mr. F. G. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MADUBEDUBE, N.O. *v.* MTANDANA.

N.A.C. CASE No. 47 OF 1958.

KING WILLIAM'S TOWN: 9th March, 1959. Before Balk, President, Yates and Gray, Members of the Court.

PRACTICE AND PROCEDURE.

Where discrepancies between pleadings and evidence do not occasion prejudice they fall to be disregarded on appeal—Transfer or alienation of land falling within the purview of Proclamation No. 117 *of* 1931—*Evidence necessary that prior approval of Chief Native Commissioner obtained.*

Summary: Plaintiff (now respondent) sued defendant (present appellant) successfully for the transfer to him of certain property falling within the purview of Proclamation No. 117 of 1931.

The defendant is the heir of one Edward Tunana Madubedube.

Plaintiff had lent the sum of £150 to Edward in the year 1954 under an agreement that, should Edward fail to repay the loan by a stipulated time, the plaintiff was to receive

transfer of the property. The plaintiff thereafter obtained judgment for the transfer of the property to him but before this judgment could be implemented, Edward died.

The plaintiff based his case on an alleged sale and not on the agreement which he proved, viz., that he was to receive transfer of the property if the deceased did not repay the loan within the time stipulated.

Held: That, it is manifest from the preamble of, read with Schedule "A" to Proclamation No. 117 of 1931 and with the Schedule to the Native Land Act, 1913, as amended, that the provisions of this Proclamation apply to the property. Consequently the property cannot be transferred without the approval of the Chief Native Commissioner first had and obtained. There is nothing to show that such approval was obtained in the instant case.

Held further: That, the fact that the plaintiff based his case on an alleged sale and not on the agreement which he proved, did not occasion any prejudice to the defendant as it came to light early in the trial i.e., whilst the plaintiff was testifying, and he was cross-examined thereanent so that at this stage the defect in question is of no moment and falls to be disregarded in terms of the proviso to section *fifteen* of the Native Administration Act, 1927.

Cases referred to:

Matengjane *v.* Ngowa, 1957 N.A.C. 168 (S.).
Gcukumani *v.* N'Tshekisa, 1958 (1) N.A.C. 28 (S.).
Mouton *v.* Hanekom, 72 P.H. A. 42 (A.D.).
Mbotya *v.* Nhlontlo, 1956 N.A.C. 70 (S.).
Calder-Potts *v.* McMillan, 1956 (3) S.A. 360 (E.D.L.D.).
Makgothi *v.* Masisi, (2) 1933 O.P.D. 93.

Appeal from the court of the Native Commissioner at Whittlesea.

Balk (President):—

Good cause having been shown, the application for condonation of the late noting of the appeal was granted.

The appeal is from the judgment of a Native Commissioner's Court for plaintiff (now respondent), with costs, in an action in which he sued the defendant (present appellant) for the transfer to him of Building Lot 16 and Garden Lot 101, both situate in Tzitzikama Sub-Location in the location of Oxkraal and Kamastone, District of Queenstown.

In the particulars of his claim, the plaintiff averred, *inter alia*—

(1) that he had purchased these lots from the late Edward Tunana Madubedube (hereinafter referred to as "the deceased") for the sum of £150;

(2) that this sum was duly paid by him to the deceased;

(3) that he had obtained judgment against deceased for the transfer to him of the lots but that the deceased had died before the judgment could be implemented; and

(4) that the defendant was the deceased's heir and had failed to effect the transfer of the lots to him notwithstanding demand.

In his plea the defendant denied the alleged sale.

The Native Commissioner's judgment orders the defendant to take the necessary steps to transfer the lots to the plaintiff, and, failing compliance by him with this order, it directs the Messenger of the Court to do so.

The grounds of appeal, as amended with the leave of this Court, read as follows:—

"1. That the judgment is against the weight of evidence.

2. That the Native Commissioner erred in finding that there was a valid contract entered into by the late Edward Tunana Madubedube and Gilbert Mtandana as per exhibits "A" and "D" filed of record whereby the former undertook in the event of his failing to repay to the latter by February, 1955 (which date was extended to 30th April, 1955) an alleged loan of £150, to transfer to the said Gilbert Mtandana Nos. B.L. 16 and G.L. 101, Tsitsikama Location, Whittlesea in payment of the said loan of 150, for the following reasons:—

   (*a*) That the amended condition No. II of the Title Deed governing the above-mentioned land clearly states that such land shall not be alienated, transferred or leased except with the consent of the Governor-General first had and obtained. The contract if it is in itself valid and enforceable is therefore subject to a condition suspending transfer, alienation or lease of the property forming the subject matter of such contract, until the Governor-General's consent thereto has first been had and obtained. The Native Commissioner, therefore, had no power to order that defendant make transfer of the said land to plaintiff in the absence of the Governor-General's consent. Furthermore, defendant tendered the sum of £150 which was paid into Court prior to date of trial in settlement of the above-mentioned loan.

   (*b*) That a further condition of the said Title Deed exempts the said land from being liable for execution for debt, subject to certain exceptions not applicable to this case.

   (*c*) According to the statement alleged to have been signed by Edward Tunana Madubedube and plaintiff on 9th June, 1954 (Exhibit "A") the former undertook to transfer certain land which he intended purchasing i.e., Building Lot No. 16 and Garden Lot No. 101, Tsitsikama Location, to plaintiff in the event of his failing to repay to plaintiff the alleged loan of £150 by the end of February. It is submitted that the said Edward Tunana Madubedube clearly had no legal grounds for giving such an undertaking as the land described above was not at that date i.e., 9th June, 1954 registered in his name, as will more fully appear from the Title Deed governing the said land, filed of record.

   (*d*) It is submitted that the statement alleged to have been signed by Edward Tunana Madubedube on 7th March, 1955 (Exhibit "D") is invalid in that:—

      (i) It is vague and embarrassing in the extreme especially clause 3 thereof which does not specify which allotments are referred to.

      (ii) It purports to pledge the allotments mentioned therein as security for the said loan of £150 referred to above, and to confer upon the plaintiff (as pledgee) the right to have transfer of the allotments in the event of Edward Tunana Madubedube (pledgor) defaulting in repayment of the alleged loan. As such it is an invalid pledge in that it was not completed by delivery of the property pledged i.e., by transfer of the said allotments into the name of plaintiff (as pledgee) at the time when the said Exhibit "D" was signed by the parties thereto.

   (*f*) In any event the said statement more particularly paragraph 3 thereof is totally invalid in that it is in effect a *pactum commissorium* which in our law is illegal and must be treated as null and void *ab initio*."

As pointed out by the Native Commissioner in his reasons for judgment, the plaintiff's testimony, supported by the documents relating to his transaction with the deceased, which were handed in by him and form exhibits "A" and "D" in the case, fully establish—

(1) that he (plaintiff) had lent the sum of £150 to the deceased in the year 1954;

(2) that the latter had agreed that, if he did not repay this loan by February, 1955, the plaintiff was to receive transfer of the lots;

(3) that the deceased was given an extension of time until the end of April, 1955 to repay the loan but did not do so; and

(4) that he (plaintiff) thereafter obtained judgment against the deceased for the transfer of the lots to him but that, before this judgment could be implemented, the deceased had died.

That the defendant is the deceased's heir and in Native law responsible for the fulfilment of his obligations, is common cause. The plaintiff's testimony was not controverted by that of the defendant's only witness, July Madubedube. On the contrary, the latter admitted that the signatures to the documents (exhibits "A" and "D") were those of the deceased and that the plaintiff had made the loan in question to the deceased. It is true that July Madubedube is the deceased's father and that he stated that he had no knowledge of the contents of the documents (exhibits "A" and "D"), the deceased not having told him thereof. But, this evidence does not in the circumstances advance the defendant's case. Accordingly, the Native Commissioner's findings on fact cannot be gainsaid. Admittedly, the plaintiff based his case on an alleged sale and not on the agreement which he proved, viz., that he was to receive transfer of the lots if the deceased did not repay the loan within the time stipulated. But, this discrepancy did not occasion any prejudice to the defendant as it came to light early in the trial i.e., whilst the plaintiff was testifying, and he was cross-examined thereanent so that at this stage the defect in question is of no moment and falls to be disregarded in terms of the proviso to section *fifteen* of the Native Administration Act, 1927, see Matengjane *v.* Ngowa 1957 N.A.C. 168 (S.), at page 171, Gcukumani *v.* N'Tshekisa 1958 (1) N.A.C. 28 (S.), at page 30, and Mouton *v.* Hanekom 72 P.H., A. 42 (A.D.), at page 139. It follows that the first ground of appeal fails.

Turning to the remaining ground of appeal, it is manifest from the preamble of, read with Schedule "A" to, Proclamation No. 117 of 1931 and with the Schedule to the Natives Land Act, 1913, as amended, that the provisions of this Proclamation apply to the lots. Consequently, the lots cannot, in terms of section *thirteen* (1) of the Proclamation, as amended by Government Notice No. 918 of 1932, be alienated or transferred without the approval of the Chief Native Commissioner first had and obtained. There is nothing to show that such approval was obtained in the instant case. Mr. Heathcote, who appeared on behalf of the appellant, argued strenuously that the legislature could not have intended that an agreement for the alienation of land falling within the purview of the Proclamation, could not be entered into without the prior approval of the Chief Native Commissioner in view of the practical difficulties involved. But, this contention cannot be regarded as sound as the language of section *thirteen* (1) of the Proclamation plainly provides that the registered holder of such land shall not alienate, transfer or lease it without the approval of the Chief Native Commissioner first had and obtained and there do not appear to be any practical difficulties in giving effect to this provision in that it is open to parties to agree that they will enter into a transaction for

the alienation of land of the nature in question subject to the Chief Native Commissioner's approval of such alienation being obtained before the transaction itself is concluded. It follows that, as contended by Mr. Stewart in his argument on behalf of the appellant, it was not competent for the trial Court to have given judgment for the plaintiff for the transfer of the land to him in the absence of proof that the Chief Native Commissioner's prior approval of the alienation and transfer had been obtained, see Mbotya *v.* Mhlontlo 1956 N.A.C. 70 (S.), at page 74, and the authority there cited, viz., Caller-Potts *v.* McMillan 1956 (3) S.A. 360 (E.D.L.D.), at page 362, as well as the authority relied upon in the last-mentioned case, viz., Makgothi *v.* Masisi, (2) 1933 O.P.D. 93.

In the result the appeal falls to be allowed, with costs, and the judgment of the court *a quo* altered to one of absolution from the instance, with costs.

Yates and Gray, Members, concurred.

For Appellant: Mr. T. Stewart, Kingwilliamstown.

For Respondent: Mr. E. Heathcote, Kingwilliamstown.

SOUTHERN NATIVE APPEAL COURT.

MBILANA *v.* GEGE.

N.A.C. CASE No. 55 *of* 1958.

KING WILLIAM'S TOWN: 9th March, 1959. Before Balk, President, Yates and Gray, Members of the Court.

NATIVE CUSTOM.

Intercourse with wife while latter suckling child contrary to custom—Letter by man other than husband to latter's wife constitutes undue familiarity in absence of satisfactory explanation.

Summary: Plaintiff (now respondent) sued defendant (present appellant) for 10 head of cattle or their value £100, as damages for adultery with his (plaintiff's) wife, Virginia, resulting in her having twice been rendered pregnant.

In March, 1954, Virginia left for her people in Simonstown where she met the defendant. On the 8th May, 1955, she gave birth to a child. This Court was not concerned with the paternity of this child as the Native Commissioner found against plaintiff on this score and there was no cross-appeal. The plaintiff joined Virginia at Simonstown on the 12th October, 1954, and continued to live with her until she disappeared in March, 1957. She returned to Simonstown in October, 1957 with a child born to her on the 22nd July, 1957. In the course of their evidence, Virginia and plaintiff

stated that they did not have intercourse after Virginia had given birth to the child on the 8th May, 1955. Virginia gave the reason for this as being that she had duped her husband into believing that she had not as yet weaned her child up to the date of her departure, viz., March, 1957.

Virginia produced two letters which, she alleged, had been written to her by the defendant after her departure in March, 1957, and on this score her evidence was accepted.

Held: That, according to custom, a husband does not have sexual intercourse with his wife until the child is weaned.

Held further: That, a letter written by a man other than the husband to the latter's wife constitutes, in the Native eye, undue familiarity in the absence of a satisfactory explanation therefor.

Cases referred to:

Gcukumani *v.* N'Tshekisa, 1958 (1) N.A.C. 28 (S.).
Wiehman *v.* Simon, N.O. 1938 A.D., 447.

Appeal from the Court of the Native Commissioner at Salt River.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court awarding plaintiff (now respondent) £50 and costs in an action in which he claimed ten head of cattle or their value, £100, from the defendant (present appellant) as damages for adultery with his wife, Virginia, resulting in her having twice been rendered pregnant.

The Native Commissioner found for the plaintiff in respect of the alleged adultery which resulted in the second pregnancy holding that the case against the defendant had not been substantiated in so far as the first pregnancy was concerned. The latter aspect does not call for consideration in the absence of a cross-appeal.

In his plea, the defendant denied the alleged adultry so that the onus of proof rested on the plaintiff.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of evidence and probabilities of the case and is not supported thereby.

2. That the Native Commissioner erred in finding that although husband and wife had been sharing the same bed between October, 1954, and March, 1957, there had been no intercourse between them.

3. That the Native Commissioner errred in finding that the denial by defendant of the contents of a letter alleged to have been written by him corroborated the evidence of the woman in respect of any specific acts of adultery deposed to by her."

The second and third grounds of appeal take the matter no further than the first ground as the second ground obviously relates solely to the facts and as regards the third ground, corroboration of the wife's evidence in a claim for damages for adultery committed with her, is not required as a rule of law but merely to substantiate the case on fact, as was conceded by Mr. Heathcote in the course of his argument on behalf of the appellant, see Gcukumani *v.* N'Tshekisa, 1958 (1) N.A.C. 28 (S.), at page 29.

Proceeding to a consideration of the appeal which, for the reasons given above, resolves itself to one on fact, the undisputed facts are that the plaintiff married Virginia by civil rites on the 4th April, 1950 and had two children by her. Thereafter, she left for her people in Simonstown with his consent. That was in March, 1954. At Simonstown she met the defendant whose wife left him in March, 1954 shortly after her (Virginia's) arrival there. Virginia gave birth to a daughter, Lulama, at Simonstown on the 8th May, 1955. We are not concerned with the paternity of this child since, as pointed out above, the Native Commissioner found against the plaintiff on this score and there is no cross-appeal. The plaintiff joined Virginia at Simonstown on the 12th October, 1954, and continued to live with her until she disappeared in March, 1957. She returned to Simonstown in October, 1957 with a child named Boy-boy, born to her on 22nd July, 1957. From March to October, 1957, she lived at Fort Beaufort whilst the defendant continued to live at Simonstown.

In my view, the Native Commissioner has given cogent reasons for his finding for plaintiff. It is true that, as was stressed by Mr. Heathcote in his argument on behalf of the appellant, the plaintiff and his wife lived together from October, 1954 to March, 1957. But, as pointed out by the Native Commissioner in his reasons for judgment, she explained in the course of her evidence for the plaintiff why they did not have sexual intercourse during that period, viz., because, as is customary, a husband does not have sexual intercourse with his wife before the child is weaned and she duped the plaintiff by continuing to breast-feed Lulama as long as possible to keep him away whilst she had relations with the defendant; and here it must be borne in mind that the Native Commissioner states in his reasons for judgment that the plaintiff gave him the impression of not being endowed with much intelligence and of being a person who would easily be deceived by his wife's more dominant personality. To my mind, the testimony of the plaintiff's wife bore the impress of truth and sincerity being, as it is, in accordance with the probabilities. Mr. Heathcote pointed out several seeming improbabilities in her evidence but, viewed in their proper perspective, these seeming improbabilities are more apparent than real. She gave a good reason for her disappearance from the common home in March, 1957, i.e., that the plaintiff suspected she was pregnant and wanted to take her to a doctor and she and the defendant agreed that she should disappear, the defendant giving her the money for her rail fare and her subsistence for this purpose. Her testimony here carries conviction, particularly as the defendant was unable to suggest any other reason for her leaving. Again, she did not hesitate to admit in the course of her evidence that no one knew anything about her relations with the defendant. Admittedly, there is a discrepancy between her testimony and that of her father for the plaintiff as regards whether the defendant's wife left him before she (plaintiff's wife) came to Simonstown. The latter stated that the defendant's wife was then still there whereas her father stated that the defendant's wife had left before the plainiff's wife had arrived. But, in the nature of things, the latter would be in a better position to recollect the matter and, in any event, the discrepancy is not a material one and may well be due to faulty recolleciton on the father's part. There are also several discrepancies between the evidence of the plaintiff's wife and the contents of the letters (exhibits "B" and "C"). These discrepancies, however, are of little moment, being on immaterial points, and may well also be due to faulty recollection. As conceded by the Native Commissioner in his reasons for judgment, Filda Kasibe's testimony for the plaintiff fell to be rejected not only because of the evidence of the plaintiff's wife that no one knew of her relations with the defendant but also because of the blatant inconsistencies in her (Filda's) testimony. The Native Commissioner also gives cogent reasons for finding that the defendant wrote the letter

(exhibit "C") to the plaintiff's wife. Apart therefrom, it is obvious even to a layman that the writing in the letter (exhibit "C") is the same as that in the letter (exhibit "B") which the defendant admitted having written. That this is so, is apparant from the marked similarity of the writing not only in the letters (exhibis "B" and "C") but also in the specimen of the defendant's handwriting (exhibit "F"), particularly in the case of the letters "b" and "M". That the defendant's false denial that he wrote the letter (exhibit "C") to the plaintiff's wife affords corroboration of her testimony that he committed adultery with her, may be gathered from the fact that his explanation for having written the letter (exhibit "B") to the plaintiff's wife is that its purpose was the remittance of £1. 10s. which he owed her for beer in response to her letter to him; and that it would be extremely difficult to explain away the second letter (exhibit "C") bearing in mind that, in the Native eye, it would, in the absence of a satisfactory explanation, constitute undue familiarity by the defendant with the plaintiff's wife. The false denial is, therefore, consistent with the evidence of the plaintiff's wife and inconsistent with the defendant's innocence, as pointed out by the Native Commissioner in his reasons for judgment, and thus affords corroboration, see Wichman *v.* Simon N.O. 1928 A.D. 447, at page 450. Then, there is the improbability in the defendant's evidence referred to by the Native Commissioner in his reasons for judgment, viz., that whilst he knew that the parents of the plaintiff's wife were distressed by her sudden disappearance, he did not tell them where she was after she had written to him; and his explanation for not having done so, i.e., that is was none of his business, is singularly unconvincing to say the least. As the Native Commissioner states in his reasons for judgment, the defendant's explanation falls to be rejected and the testimony of the plaintiff's wife that the defendant connived at concealing her pregnancy to be accepted and the inference drawn therefrom that the defendant was responsible for her condition. Moreover, there is a most material discrepancy between the defendant's evidence and the letter (exhibit "B") which he admitted he had written to the plaintiff's wife. According to his testimony, she wrote to him once only asking him to pay her the £1. 10s. he owed her for beer. Yet, in his letter (exhibit "B") he states that he received both her letters. This discrepancy is a most significant feature in that it indicates that the defendant's explanation for writing the letter (exhibit "B") is false and that the version of the plaintiff's wife that the defendant wrote to her because he was responsible for her condition and, to conceal it, had connived at her disappearance, is correct. Finally, there are material inconsistencies in the defendant's evidence which show that the truth lies with the plaintiff's wife. He first stated that he did not know that her people had been to consult a witch-doctor anent her disappearance and later stated that he did know that they had done so. He also stated that she had written to him asking for payment of the 30s. due to her for beer. Thereafter he changed this version and said she had written asking him to send her money without signifying the amount, because her child was ill and that she had not asked him for the payment of the 30s. he owed her for the beer but that he had nevertheless sent this money to her.

In the circumstances, there can, to my mind, be no doubt that the probabilities favour the plaintiff's case to an extent that fully justifies the finding that he discharged the onus of proof resting on him on the pleadings. The Native Commissioner cannot, therefore, be said to be wrong in entering judgment for the plaintiff, and accordingly the appeal falls to be dismissed, with costs.

Yates and Gray, Members, concurred.

For Appellant: Mr. E. Heathcote, Kingwilliamstown.

For Respondent: Mr. B. Barnes, Kingwilliamstown.

SOUTHERN NATIVE APPEAL COURT.

NANTSWANA *v.* **QASANE.**

N.A.C. CASE No. 59 OF 1958.

UMTATA: 2nd February, 1959. Before Balk, President, Yates and Zietsman, Members of the Court.

PRACTICE AND PROCEDURE.

Application for leave to lead evidence before this Court in connection with an appeal or for alternative relief—Native Appeal Court no jurisdiction to hear further evidence.

Competent under prayer for alternative relief to remit Case to Court a quo *for the hearing of such evidence—considerations.*

Summary: In an appeal on fact from the judgment of a Native Commissioner's Court, this Court heard an application by appellant to lead further evidence before it. The application also contained a prayer for alternative relief.

Held: That Native Appeal Courts have no jurisdiction to hear evidence.

Held further: That in a proper case it is competent under the prayer for alternative relief to remit the case to the Court *a quo* for the hearing of such evidence.

Cases referred to:

Shein *v.* Excess Insurance Co., Ltd., 1912 A.D. 382.
Deintjie *v.* Gratus and Gratus,, 1929 A.D. 1.
Goodrich *v.* Botha and Others, 1954 (2) S.A. 540 (A.D.).
Khoapa *v.* Mothapa, 1 N.A.C. (S. D.).
Harris and Others *v.* Minister of the Interior and Another, 1952 (2) S.A. 428 (A.D.).
Beck's Pleading in Civil Actions (Second Edition).
Colman *v.* Dunbar, 1933 A.D. 141.
Hassim *v.* Naik, 1952 (3) S.A. 331 (A.D.).

Appeal from the court of the Native Commissioner at Willowvale.

Balk (President):—

The defendant brought an appeal on fact from the judgment of a Native Commissioner's Court for plaintiff as prayed, with costs, in an action in which the latter claimed from the defendant five head of cattle or their value, £50, as damages for the seduction of his unmarried sister, Nomabaso, resulting in her pregnancy.

In limine this Court heard an application by the appellant to lead or place before it the evidence of R. S. Canca and S. S. Mnqeta as set out in the supporting affidavits annexed thereto. The application, which was opposed by Mr. Airey on behalf of the respondent, also contained a prayer for alternative relief.

Whilst there is an enabling section in the Native Administration Act, 1927 (hereinafter referred to as "the Act") providing for rules to be made prescribing, *inter alia,* the mode of compelling the attendance of witnesses before Native Appeal Courts, see section *thirteen* (5) (*b*) of the Act, no such rules have been made as is apparent from a perusal of the Rules for Native Appeal Courts published under Government Notice No. 2887 of 1951,

as amended by Government Notice No. 627 of 1953. The language of section *fifteen* of the Act, which sets out the powers of Native Appeal Courts, is very wide, in particular the provision therein that such a Court may make any such order upon the case as the interests of justice may require. But, this is a general provision for the disposal of appeals and it seems to me that in the absence of a specific provision empowering Native Appeal Courts to hear evidence, this Court would not be justified in assuming that it had such power. This view finds support in the judgment in Shein *v.* Excess Insurance Co., Ltd., 1912 A.D. 382, at page 389, from which it is manifest that in the absence of the specific provision in section *four* of Act No. 1 of 1911 empowering the Appellate Division of the Supreme Court to hear evidence, it would be precluded from doing so. This aspect of that decision was confirmed in Deintjie *v.* Gratus and Gratus 1929 A.D. 1, at pages 5 and 6, and in Goodrich *v.* Botha and Others 1954 (2) S.A. 540 (A.D.), at page 545. In addition, there are the decisions of this Court to the same effect in Khoapa *v.* Mothapa 1 N.A.C. (S.D.) 161, at page 162 and in Mcitakali's case there cited. That being so and as it is not clear to me that these Native Appeal Court decisions are wrong, the *stare decisis* rule applies and this Court is bound thereby, see Harris and Others *v.* Minister of the Interior and Another 1952 (2) S.A. 428 (A.D.), at pages 452 to 454. Again, even assuming that the hearing of evidence by a Native Appeal Court is envisaged by the provision in section *fifteen* of the Act that such a Court may make any such order upon the case as the interests of justice may require, effect could not be given thereto in the absence of Rules prescribing the mode of compelling the attendance of witnesses before Native Appeal Courts. Accordingly, the application was not entertained in so far as it concerned the hearing of further evidence by this Court.

In his argument on behalf of the applicant, Mr. Canca submitted that, in the event of this Court's taking that view, it should, under the prayer for alternative relief, remit the case to the trial Court for the hearing of the further evidence set out in the supporting affidavits. Such a course is specifically sanctioned by section *fifteen* of the Act but Mr. Airey contended that it could not be regarded as included in the prayer for alternative relief in that it was in conflict with the main relief sought. The extent to which a prayer for general or alternative relief, also known as the salutary clause, covers claims not specifically made, is discussed in *Beck's Pleading in Civil Actions* (Second Edition, at pages 47 and 48 where the relevant authorities are also cited. It would appear therefrom that the criterion is whether or not the relief asked for in the salutary clause is of quite a different nature from the main relief sought. If it is, then it is not competent for the Court to grant it; if it is not, the Court may do so. In my view, the relief here asked for under the salutary clause falls to be regarded as sufficiently kindred to the main relief sought to permit of its being granted by this Court. That this is the position, seems clear from the fact that in both instances the gravamen of the relief desired is the hearing of the further evidence. The question of the tribunal before which such evidence should be heard, is relatively of minor importance, being no more than incidental.

Mr. Airey also opposed the application on the ground that it went beyond the four corners of the record of the case under appeal. But, whilst the rule is that in appeals the appellant is bound by the four corners of such record, applications such as the present one are necessarily exceptions to the rule for otherwise they could not be brought before the court. That this is so, is implicit in Shein's case (*supra*), at page 391. The next question calling for consideration is whether this Court ought to grant the alternative relief regard being had to the principles enunciated in the Appellate Division cases referred to above and, in particular, in Colman *v.* Dunbar 1933 A.D. 141, at pages 161

and 162, cited by Mr. Canca in support of the application. Here it should be mentioned that the supporting affidavits annexed to the application are made by the witnesses whom the applicant desires to call and embody their evidence which he wishes to adduce. Such a procedure was disapproved in Shein's case (*supra*), at page 391, save of course in cases where the appellate tribunal specifically directs that such affidavits should be furnished. The nature of the affidavits generally required is also indicated on that page, i.e. they should set forth briefly the points on which new evidence is desired, the general nature of the evidence which the applicant is prepared to adduce and the special grounds on which he relies for indulgence. This procedure should be followed in future applications of the nature in question brought before this Court.

Turning to the merits of the application for the alternative relief sought, the testimony which it is proposed that Canca should give, concerns the baptismal certificate put in at the trial in the Native Commissioner's Court and forming Exhibit "C" in the case. Although this certificate was accepted by the trial Court as probative of the allegation by the plaintiff's (present respondent's) witnesses that Nomabaso was also named Mildred and it formed one of the factors which influenced the Assistant Native Commissioner in finding for the plaintiff (present respondent), as is clear from his reasons for judgment, the certificate is inadmissible for this purpose as it does not constitute a certificate issued under express authority, judicial or statutory, see Hassim *v.* Naik 1952 (3) S.A. 331 (A.D.), at pages 339 and 340. It follows that no useful purpose would be served by Canca's evidence indicating that the certificate (Exhibit "C") is false. In this connection it should be added that whilst the depositions contained in the supporting affidavits indicate that the respondent may have obtained the certificate (Exhibit "C") by fraudulent means, this position is by no means clear so that from this aspect also the applicant is not entitled to succeed in so far as Canca's evidence is concerned see Colman's case (*supra*), at page 162. The remaining evidence which the applicant desires to lead is that of Mnqeta that Nomabaso's name was Rosalina and not Mildred. To my mind, there can be no doubt that the application for alternative relief should be granted in so far as Mnqeta's evidence is concerned since, as pointed out by Mr. Canca, it is manifest from the supporting affidavits that all the conditions precedent, as set out in Colman's case (*supra*), at pages 161 to 163, are satisfied, i.e., (1) the applicant has shown that he could not have obtained Mnqeta's evidence if he had used reasonable diligence as it is clear from the supporting affidavits that this evidence only came to light fortuitously after the conclusion of the trial; (2) that evidence is weighty and material and presumably to be believed and is such that, if adduced, it would be practically conclusive as it would show that the witnesses relied upon by the Native Commissioner in finding for the plaintiff (present respondent) lied in a most material respect and are, therefore, unworthy of credence; and (3) it is also manifest that the conditions have not so changed that the contemplated fresh evidence will prejudice the opposite party. It seems to me that it would be fairest to both parties if the costs of the application and appeal are made to abide the hearing of the case on remittal. In the result, the application falls to be granted and the judgment of the Court *a quo* set aside and the case remitted to that Court for the hearing of Solomon S. Mnqeta's evidence as set out in his supporting affidavit annexed to the application and thereupon for a fresh judgment. The appeal should be struck off the roll. Costs of the application and the appeal should abide the outcome of the hearing on remittal.

Yates and Zietsman, Members, concurred.

For Appellant: Mr. R. S. Canca, Willowvale.

For Respondent: Mr. F. G. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NGCUZWANA *v.* ZIMEMO.

N.A.C. CASE No. 2 OF 1959.

UMTATA: 2nd June, 1959. Before Yates, Acting President, Baikie and Durno, Members of the Court.

NATIVE LAW AND CUSTOM.

Agreement to settle debt out of dowry to be paid for daughter—Considerations.

Summary: The judgment debtor agreed to settle his debt out of the dowry to be paid for his (judgment debtor's) daughter. On the marriage of his daughter the judgment debtor failed to honour this agreement and instead paid over the cattle received to a third party (now respondent) as dowry for his (judgment debtor's) son. The judgment creditor thereupon caused these cattle to be attached. On the matter coming before the Court *a quo* the cattle were declared to be not executable.

Held: That, if the cattle in question have been pointed out to the person to whom they are promised, then he would have the right to follow them up if they were subsequently paid to someone else. Once, however, the cattle have left the possession of the debtor without having been previously pointed out the creditor would not have the right to claim them from a third party.

Appeal from the Court of the Native Commissioner at Mqanduli.

Yates (Acting President):—

This is an appeal from the judgment of the Native Commissioner's Court in an interpleader action declaring certain eight head of stock to be not executable, with costs.

The respondent (judgment creditor in the Court below) has appealed against this judgment on the grounds that it is against the weight of evidence and the probabilities of the case.

The position is that the judgment creditor obtained a judgment in the Native Commissioner's Court against the judgment debtor in the sum of £64. and costs. A writ was issued in 1952 and a *nulla bona* return was made. Subsequently the judgment debtor agreed that he would settle the debt when his daughter was married. In 1958 the daughter married and the writ was re-issued, but when the Messenger went to serve the writ it was found that the dowry cattle had been paid by the debtor to applicant as dowry for his son. The cattle had been registered in the name of Sivendu Yekoni in the Ngqeleni District and no attachment was made. Subsequently the cattle were found in claimant's possession at Mkwenkwana's Kraal in the Mqanduli district, and were attached.

Claimant states that his sister married Sivendu's son and that dowry was paid with eight head of cattle. Three cattle were delivered in October 1958 and transferred to the name of Mkwenkwana. He claims these cattle as having been legitimately paid as dowry for his sister.

Now it seems clear that the judgment debtor, Pike Ngcobo, has behaved dishonestly in this matter. He agreed to settle his debt with the judgment creditor from the dowry to be paid when his daughter married, but when she did marry, he used the cattle

to pay for his son's dowry. The claimant came into possession of the cattle bona fide and without notice of any prior claim, and they remained in his possession for three months before they were atatched.

This practice of promising payment of a debt out of the dowry of a daughter is not unknown amongst Natives, as pointed out by Seymour at page 95 of his book "Native Law in South Africa", but if the father retains the custody of the girl, the dowry paid for her vests in him, and he must settle the debt. The position here is that he has failed to do so, and the Native Commissioner, not being sure of the position, has applied Common Law and in accordance with these principles came to the conclusion that the essentials comprising a contract of pledge had not been complied with in that the pledged property was not delivered to the pledgee and therefore third parties cannot be bound. Smith versus Farrelly's Trustee 1904 T.S. 955.

Even according to Native law there was not a pledge but merely an indication from what source the debt would be met; for according to the Native assessors in the case of Nkalitshana *v.* Mdygolo 3 N.A.C. 208, in the event of a pledge the cattle must be pointed out, and here they were not even in existence at the time, so there was no pledge.

The following question was then put to the Tembu assessors in attendance, viz.:—

1. Bungane Mgudlwa, Engcobo.
2. Bokleni Dalasile, Engcobo.
3. Mahlamvu Dumalisile, Mqanduli.
4. Ephraim Sangoni, Umtata.

"In a case where a man owes another money and promises to settle the debt from the dowry of his daughter when she marries but subsequently, when the dowry is paid, he passes it to a third party in payment of the dowry of his own son, has the original creditor any claim to the cattle?"

The unanimous reply was that "Such an agreement is a usual thing amongst Natives. The man who was promised payment out of the dowry, has a claim. When the girl is growing up at her father's kraal the creditor usually visits the girl to see how she is getting on and brings her presents. He is not forced to buy them, but wants to please her as she is pledged to him.

If the cattle are pointed out to the person to whom they were promised, then he would have the right to follow them up if they were subsequently paid to someone else.

Once the cattle have left the possession of the debtor without having been previously pointed out however, the creditor would not have the right to claim them from the third party. His claim would only be against the father." In other words, the pledgee must be wide awake to safeguard his interests.

At the outset of the argument Mr. Knopf, who appeared for the appellant, informed the Court that the appeal had been brought by agreement in order to obtain a ruling as to a third party's rights in these circumstances, and stated that the attorneys were dealing with this matter *pro deo*. He suggested that there should be no order of costs.

It is clear that according to Native law the claimants rights in such a case as this are protected. The Native Commissioner's judgment is therefore upheld, and the appeal is dismissed with no order as to costs.

Baikie and Durno, Members, concurred.

For Appellant: Mr. R. Knopf, Umtata.

For Respondent: In default.

CENTRAL NATIVE APPEAL COURT.

DADA AND DADA *v.* MDLADLAMBA.

N.A.C. CASE No. 5 OF 1959.

UMTATA: 28th September, 1959. Before Yates, Acting President, Pike and Kelly, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—Case to be retried by Native Commissioner as if it were one of first instance in his Court. Damages for Pregnancy—Onus on defendant to prove that he is not father of child where he admits to intercourse within period of 12 months before birth.

Summary: Plaintiff (now respondent) sued defendants (present appellants) in a chief's court for damages for the pregnancy of his daughter alleged to have been caused by second defendant. The latter admitted having had intercourse with plaintiff's daughter on the 26th October, 1957. He alleged, however, that prior to this he had been away at work. The child was born on the 10th June, 1958. The Chief gave judgment in favour of the plaintiff. On appeal the Native Commissioner called upon defendants to give their evidence first.

Held: That an admission by a man of having had intercourse with a woman within 12 months of the birth of her child places the onus on him to prove that he is not the father of the child in question.

Held further: That according to Native law, where a man admits having had intercourse with a woman he is held responsible should she become pregnant unless he can point to someone else as being the author of the pregnancy.

Held further: That a Native Commissioner is required to rehear and retry a case taken before him on appeal from a chief's court as if it were one of first instance in the Native Commissioner's Court.

Cases referred to:

Maphanga *v.* Koza and Ano. 1 N.A.C. (S.D.) 204.
Mandayi and Nomnqa *v.* Vananda 1945 N.A.C. (C & O) 19.
Ngxazana *v.* Halam 1940 N.A.C. (C & O) 57.
Manakaza *v.* Mhaga 1950 N.A.C. (S.D.) 213
Bacela *v.* Mbontsi 1956 N.A.C. 61.

Appeal from the Court of the Native Commissioner at Mount Fletcher.

YATES (Acting President).

At the outset Mr. Knopf applied for condination of the late noting of appeal, pointing out that the appeal had been filed timeously but that the deposit of security for costs had been inadvertently delayed. Mr. Muggleston, for respondent, did not object, and the application was granted.

This case originated in a chief's court where judgment was given in favour of plaintiff (present respondent) against defendants (present appellants) for six head of cattle as damages for the pregnancy of plaintiff's daughter caused by defendant No. 2.

This judgment is dated 22nd August, 1958, and an appeal was noted to the Native Commissioner's Court, Mount Fletcher, on 5th September, 1958, on the grounds that defendant No. 2 was away at work until the end of October, 1957, and therefore could not be the father of the child born to Philpina on 10th June, 1958.

A counterclaim was lodged for the return of one heifer in calf, one horse and £15 in cash paid as damages for the seduction and pregnancy of Philpina under the mistaken belief that defendant No. 2 was the father of the child.

Although there is nothing on the record to indicate it, the Native Commissioner apparently held that the onus was on defendant to prove that he was not the father of the child, as defendant's case was presented first. At the conclusion of the hearing, the Native Commissioner dismissed both the appeal and the counterclaim.

Against this judgment this appeal is brought on the grounds that:—

" 1. The Native Commissioner erred in calling upon defendants in the chief's court to lead their evidence first in the Native Commissioner's Court. It is submitted that this is contrary to the provision of Section 12 (4) of the Regulations of the Chief's and Headman's Court published in Government Notice No. 3885, dated 9th December, 1951.

2. The defendants and the present Appellants showed a clear balance of probability in their favour in the Native Commissioner's Court.

3. It is submitted that the plaintiff failed to show a balance of probability in his favour in the Native Commissioner's Court.

4. For the plaintiff to have succeeded in the Native Commissioner's Court, the Court should be satisfied—

(*a*) that plaintiff's daughter was abnormal in that she did not conceive at the time that the vast majority of women normally conceive;

(*b*) that the plaintiff's daughter was abnormal in that the period of gestation was not as long as that of the vast majority of women;

(*c*) that the child born was abnormal in that it was born prematurely.

5. It is submitted with respect that the plaintiff failed to prove the facts detailed in the preceding clause.

6. Defendants proved prima facie that they had been misled by untruthful statements of Nonziyati, a member of the party who reported the seduction, regarding the period that Philpina had been pregnant. Plaintiff failed to effectively rebut the evidence of the defendants by calling Nonzinyati who was acting on plaintiff's behalf at the time.

7. The judgment is generally against the weight of evidence and is bad in law."

In connection with the first ground of appeal, it is correct that the case should have been tried by the Native Commissioner as one of first instance, in which case the onus would lie with plaintiff. However, as pointed out in the case of Maphunga *v.* Koza and Ano 1 N.A.C. (S.D.) 204 (1950) if intercourse within a year of the birth of the child is admitted, the onus is on the man to prove that he is not the father. In this case intercourse has not been denied and in view of the defendant's admission, he cannot be held to have been prejudiced by being required to state his case first.

Turning now to the remaining grounds of appeal, it is quite clear that this is a case under Native law and custom which lays down that where a man has admitted having had connection with a woman, he is held responsible should she become pregnant, unless he can point to someone else as being the author of her pregnancy. See Mandayi and Nomnqa *v.* Vananda 1943 N.A.C. (C & O) 19.

It was held in Ngxazana *v.* Malam 1940 N.A.C. (C & O) 57 that "once it is established that a period of gestation of 212 days is involved, or it is admitted that at the commencement of that period, the plaintiff's brother, for whom he paid, did have sexual relations with the girl . . . we have a simple legal problem to solve. Voet 1.6.4. holds that the 'lawful' time of gestation runs from the beginning of the 7th month to the end of the 11th month, and that offspring born is the 7th month after marriage or later is considered as legitimate. See Fitzgerald *v.* Green 1911, E.L.D. at page 463."

"It avails the plaintiff nothing to attempt by isolated testimony to question the minimum limit so set out . . . It is only by proving conclusively that he is *not* the father that the plaintiff can succeed."

See also the case of Mana kaza *v.* Mhaga 1950 N.A.C. (S.D.) 213, page 217, where it is stated "An admission by the defendant of intercourse at that time (i.e. at a time when the defendant could have been the father) casts the heavy onus on him of proving that it was impossible for him to have been the father."

In this case we are faced with the position that the defendant has admitted intercourse on 26th October, 1957, and therefore he must prove that he is not the father of the child.

Bacela *v.* Mbontsi 1956 N.A.C. 61.

The only evidence that he has brought in addition to his own denial, is that of the doctor which in the nature of things is inconclusive. As the latter says, after discussing the dates of the last menstrual period and the date of intercourse: "It is possible that the person having intercourse with the mother is the father of the child, and it is also possible that he would not be the father of the child. One cannot say either way with any degree of certainty."

Mr. Knopf conceded that, although it was improbable, defendant could not prove that it was impossible for him to have been the father, and that he was unable to say that the decision in Manakaza *v.* Mhaza (supra) was wrong.

In the circumstances, therefore, the Native Commissioner was correct in coming to the decision which he did, and the appeal is dismissed with costs.

Pike and Kelly, Members, concurred.
For Appellant: Mr. R. Knopf, Umtata.
For Respondent: Mr. K. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MPINGWANA *v.* NOBALA.

N.A.C. CASE No. 13 OF 1959.

UMTATA: 2nd October, 1959. Before Yates, Acting President, Pike and Blakeway, Members of the Court.

PRACTICE AND PROCEDURE.

Damages—Question of quantum of damages not raised in defendant's pleadings—considerations.

Summary: Plaintiff (now respondent) successfully sued defendant (present appellant) for damages for assault. In his particulars of claim plaintiff averred that he had suffered damages in the sum of £75 but the defendant's plea amounted to a bare denial that he was liable to plaintiff for damages for assault. On appeal the attorney for the appellant argued solely on the ground that the damages awarded were excessive.

Held: That the defendant's failure to contest the quantum of damages in his plea must be accepted as an admission by him of the amount claimed.

Cases referred to:

Botha *v.* Van Zyl S.A. (3) S.W.A. 310.

Appeal from the Court of the Native Commissioner at Libode.

PIKE (Member).

The plaintiff claims £75 damages for assault and was awarded that amount by the Native Commissioner. The defendant appealed on the grounds—firstly, that the judgment is against the weight of evidence and circumstances of the case, and secondly that the damages are excessive.

In this Court Mr. Muggleston admitted that he could not substantiate the first ground of appeal and he argued solely that the damages awarded were excessive.

Particulars of claim are as follows:

"2. That in or about May, 1956, and at Tombekile Mpingwana's kraal in Maqingeni Location, the defendant wrongfully and unlawfully and without provocation assaulted the plaintiff with a sharp iron instrument on his mouth and lips, and caused him a wound disfigurement of the mouth and lips and the whole of the upper front teeth fell away as a result of which plaintiff is unable to speak well and articulately.

3. That plaintiff was removed to the Ntlaza Hospital and thence to Umtata Hospital and again back to Ntlaza Hospital and remained in hospital and undergoing treatment for a period of more than one month, and suffered much pain, inconvenience, and incurred expense in paying for his transport from Maqingeni Location to the Ntlaza Hospital and for treatment and medical expenses.

4. That in the premises plaintiff has suffered damage in the sum of £75 inclusive of pain, suffering, inconvenience, permanent disfigurement and loss of his teeth for which amount defendant is liable."

Mr. Vabaza on behalf of plaintiff contended that the amount of damages claimed was never disputed or challenged in the Court *a quo*—neither in the pleadings or in the evidence.

The plaintiff in his declaration set forth in paragraph 4 that the amount claimed was for pain, suffering, inconvenience, permanent disfigurement and loss of his teeth. Defendant did not ask for particulars, but pleaded a denial of the allegations in paragraph 2 of the claim, set forth that there was a fight in the course of which plaintiff received certain injuries, that he was *in pari delicto*, and denied "any liability to plaintiff in damages for assault". There was no averment at all in regard to paragraph 4 above.

The Rules of the Native Commissioners' Court published under Government Notice No. 2886 of 1951 provides in rule 45 (3) that the defendant in his plea shall either admit or deny or confess and avoid all the material facts alleged in the particulars to the summons and shall clearly and concisely state the nature of his defence and all the material facts on which it is based, and according to rule 45 (8) every allegation of fact by the plaintiff which is inconsistent with the plea, shall be presumed to be denied and every other allegation shall be taken to be admitted.

In the case of Botha *v.* Van Zyl, S.A. 1955 (3) (S.W.A.) 310 which was also a claim for damages, it was argued that the amount of damages had not been put in issue, and that if it was not put in issue the amount must in accordance with the Rules of Court be taken to have been admitted: This point was held to have been well taken and that it was not necessary to examine the evidence produced by plaintiff in support of his allegation of damages.

With respect I agree with that decision and in the circumstances the present appeal must fail, and it is accordingly dismissed with costs.

Yates, Acting President, and Blakeway, Member, concurred.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. J. G. Vabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

MTSHUBUNGU *v.* KAFU.

N.A.C. CASE No. 26 OF 1959.

UMTATA: 28th September, 1959. Before Yates, Acting President, Pike and Kelly, Members of the Court.

ACOMODATUM.

Negligence—Horse left untethered and untended—whether negligence in transaction of acomodatum.

Summary: Plaintiff (now respondent) sued defendant (present appellant) for the return of a saddle and bridle or their present value, £15. 15s.

On appeal this Court held that the circumstances under which a horse with saddle and bridle was placed at the disposal of the appellant by the respondent constituted a transaction of acomodatum.

From the evidence it was established that the defendant alighted from the horse at a certain kraal and entered a hut, leaving the horse, still saddled, untended and untethered outside. On reappearing from the hut he found that the horse had disappeared. The horse was later recovered without the saddle and bridle.

Held: That to leave a saddled horse untethered and untended outside a hut at a strange kraal, constitutes a degree of negligence sufficient to render the person to whom the horse had been lent liable for the loss of the saddle and bridle under a transaction of acomodatum.

Appeal from the Court of the Native Commissioner at Mount Ayliff.

YATES (Acting President).

This is an appeal from a Native Commissioner's Court in which the plaintiff (present respondent) sued defendant (present appellant) for the return of a saddle and bridle or their value £15. 15s. The Native Commissioner gave judgment for plaintiff, and it is against this judgment that this appeal is brought.

The particulars of claim read as follows:

"2. On or about the 5th July, 1954, plaintiff loaned to defendant a saddle and bridle which at that stage were new.

3. Defendant promised to return the saddle and bridle within a few months.

4. Plaintiff values the saddle and bridle at £15. 15s.

5. Despite due demand having been made, defendant either refuses and neglects to return the aforesaid saddle and bridle.

Wherefore plaintiff prays—

(*a*) for an order directing defendant to return to plaintiff the saddle and bridle referred to in paragraph 2 above, or alternatively;

(*b*) an order directing defendant to pay to plaintiff the value of the saddle and bridle which is £15. 15s."

Defendant's plea is as follows:

"2. That he denies that plaintiff lent to him a saddle and bridle, but on the contrary avers that on or about the 5th day of July, 1954, plaintiff handed to him his horse, saddle and bridle for safe keeping, on the understanding that same should be restored to plaintiff three days later.

3. That the contract entered into between the parties was one of depositum, for the benefit of the plaintiff, and was gratuitous on the part of defendant.

4. That prior to the due date for the return of the horse, saddle and bridle, same were stolen due to no negligence on the part of the defendant but that the horse has since been restored to plaintiff.

5. That defendant is not in possession of plaintiff's saddle and bridle, and in the premises is not liable to plaintiff for the loss of same.

6. That he denies that the value of the saddle and bridle is £15. 15s. and puts plaintiff to the proof thereof.

7. That in any event plaintiff's claim is based upon Common Law, and in the circumstances detailed above, same is prescribed."

To this the plaintiff replied:

"Ad paragraph 2 of the plea plaintiff admits that he handed to defendant on or about 5th July, 1954, plaintiff's horse, saddle and bridle on the understanding that the same should be restored to plaintiff about three days later. Plaintiff denies that the articles were handed over for safe-keeping.

2. Ad paragraph 3 of the defendant's plea, plaintiff denies that the contract between the parties was one of depositum and pleads further that the contract between the parties was a contract of loan for use.

3. Ad paragraph 7 of the defendant's plea plaintiff denies that his claim is based on Common Law and pleads that it is based on Native Law and is therefore not prescribed."

The appeal is brought on the grounds that:

"1. It is submitted that the actions of the defendant were not negligent in not tethering the horse in question.

2. That the judgment is generally against the weight of evidence."

The only point argued on appeal was whether the defendant was or was not negligent in not preventing the horse from straying and if he was negligent whether such negligence was sufficient to render him liable for the loss of the bridle and saddle. I accept that, as found by the Native Commissioner, the horse was lent to the defendant so that he could proceed to the wedding where he was expected to function as bestman. According to the evidence, the plaintiff's uncle lived close at hand and if plaintiff had merely wanted the horse looked after while he went on by taxi, it surely would have been very easy for him to leave it with his uncle until his return. As the horse

was lent to defendant for his benefit, he was expected to take reasonable care of it, and would be liable for any damage caused by his negligence. Njekuse *v.* Tuta 1951 N.A.C. (S.D.) 276 at page 278.

Now can it be said that he exercised that degree of care which an ordinary prudent person would exercise in respect of his own property? I do not think so. He had seen plaintiff hand the horse to a boy to hold when the discussion took place at the taxi, yet he dismounted at Pakumpaku's kraal as it was getting dusk, and simply left it in front of the huts to graze. He did not hand it to a herd boy, or tether it, or place it in a kraal as one would have expected him to do, after all, the horse was in a strange place and in the circumstances could be expected to stray. Unless he knew that the horse had been trained to stand when its reins were dropped, he should undoubtedly have taken more care, and in the circumstances, there can be no doubt that he was negligent, and that this negligence led directly to the loss of the saddle and bridle.

The appeal case is dismissed with costs.

Pike and Kelly, Members, concurred.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. F. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NKETSHENKETSHE *v.* GOBO.

N.A.C. CASE No. 28 OF 1959.

UMTATA: 23rd September, 1959. Before Yates, Acting President, Pike and Potgieter, Members of the Court.

NATIVE CUSTOM.

Ukwenzelela Custom—Cattle advanced for dowry purposes under Ukwenzelela Custom constitute a gift in absence of agreement to the contrary.

Summary: Plaintiff (present appellant) sued defendant (now respondent) in his capacity as the heir of plaintiff's late brother, Nketshenketshe, for 3 head of cattle or their value, £15. Plaintiff alleged that the said cattle had been advanced by him to his late brother to enable the latter to pay dowry for his wife. In his particulars of claim the plaintiff alleged that the late Nketshenketshe had undertaken to repay the cattle out of the dowry to be obtained for a daughter expected to be born of the marriage. No evidence was led in the court *a quo* in regard to the alleged undertaking. The late Nketshenketshe died without having a daughter.

Held: Cattle advanced for dowry purposes under the *Ukwenzelela* Custom constitute a gift in absence of an agreement to the contrary.

Held further: Where it is agreed that cattle advanced for dowry purposes under the *Ukwenzelela* system are refundable from the dowry to be obtained for a daughter of the union and the recipient dies without having a daughter the heir is liable for the refund of the dowry cattle.

Appeal from the Court of the Native Commissioner at Elliotdale.

YATES (Acting President).

In this case plaintiff (now appellant) sued defendant (now respondent) for three head of cattle or their value £15, which he alleged were due to him in accordance with the custom of

Ukwenzelela.

It is common cause that defendant is the eldest son and heir in the Right Hand House of the late Nketshenketshe Gobo, who was plaintiff's brother; when Nketshenketshe married his Right Hand wife Nohalumete, he obtained three head of cattle from plaintiff and paid them away as dowry, promising to repay them from the dowry he expected to receive for a daughter to be born to his wife. Nketshenketshe died before the debt was paid. Nohalumete had no daughters. Plaintiff has now sued defendant (Nketshenketshe's son) for the return of the three head of cattle.

Defendant has counterclaimed for three head of cattle, paid to him as damages for the seduction of his daughter; these cattle were registered in plaintiff's name at defendant's request and plaintiff is now holding them and claiming set-off in respect of the original cattle which, he alleges, defendant should pay him to liquidate the debt of his late father.

No evidence was lead as the attorneys of record agreed that the claims in convention and reconvention stood or fell by the decision as to whether the contract of *Ukwenzelela* was extinguished by the fact that Nketshenketshe did not father a daughter from his wife Nohalumete.

The point was put to the Court *a quo* as follows:

> "If a beast has been contributed to dowry under the custom of *Ukwenzelela* and the wife, who is married from the *lobola* to which this beast forms a part dies childless i.e. she does not bear a daughter from whose dowry the beast advanced would be returnable, has the donor a claim for the return of the beast, which he advanced, from the heir to the estate of the donee?
>
> The presiding officer has written an interesting treatise on what he considers to be the origin of the custom, and after considering previous cases on the subject has come to the conclusion that if the woman concerned has no daughter the debt is extinguished and is not recoverable from the estate. He concludes by stating that 'the position is therefore, if the parties agree, that the claim is based on the *Ukwenzelela* custom which they do, the plaintiff's case must fail; if, however, there was dispute on this point or an allegation that it was a loan transacted outside the four walls of this custom, evidence on this point would have to be led for the Court to decide on the merits of the evidence."

After hearing argument, the following assessors were summoned:—

Rhodes Ganituli, Elliotdale, Bomvana.
Jongilizwe Tyali, Elliotdale, Bomvana.
Daluhlanga Mdabuka, Elliodale, Gcaleka.
E. M Sangoni, Umtata, Tembu.
Bazindlovu Holomisa, Mqanduli, Tembu.
Aaron Mgudlwa, Cofimvaba, Tembu.
Bungani Mgudlwa, Engcobo, Tembu.

At the outset they agreed that the custom was the same amongst the Bomvana, Gcaleka, Tembu and Ngqika tribes, and appointed Bungani Mgudlwa as their spokesman.

The following were the questions and answers which in each case were the unanimous opinion of all the assessors:—

1. Where cattle are contributed to enable a man to pay dowry for his wife, i.e. under the custom of *Ukwenzelela*, does this, in the absence of any agreement between the parties, constitute a loan or gift?

Answer: If there are two brothers and one provides dowry for the other to pay for his wife, that custom is known as *Ukwenzelela* and is in accordance with our own custom. When you contribute under that custom, you do so as a gift; but again you could *enzelela* your brother by giving a loan, but in that case there should be a discussion between the parties.

2. Is it only a loan if there is discussion between the parties—otherwise it is a gift?

   Answer: That is the custom.

3. Whether it be a gift or a loan, are the cattle only refundable from the dowry of a daughter?

   Answer: If the arrangement under discussion was that the dowry should be refunded from the dowry of a daughter, then that must be done, and the cattle refunded from the dowry of the daughter. Having decided that it was a loan, then the receiver could agree that he would even go away to work in order to earn money to refund the loan.

4. If it is a gift, is the receiver liable to refund from the dowry of a daughter or is this a purely voluntary act on his part?

   Answer: If this was a gift then the receiver is not bound to refund anything. If he does, this will be a purely voluntary act on his part. He cannot be held to be liable in any way to refund. per E. M. Sangoni: The origin of the custom springs from the word "Ukwenza" which means to "make" or "create" i.e. by helping with the cattle, you are making him a man. It is up to the person who is being made a man to show his gratitude, if he wishes to do so, by returning or giving something back, even if it is not the same number. He can even call people to witness his act, and will say "I am a man—this is the man who made me a man—witness now that I am grateful to him".

5. Are you therefore in full agreement that in the absence of a specific stipulation or agreement, the receiver or his heir can never be sued for a refund of the cattle?

   Answer: No, he can never be sued. The only thing that would make the heir liable to be sued, would be if there was an agreement between his father and the giver.

6. What is usually done? Is it usual to make an agreement at the time of the transaction or is it usually a gift? Has it become the practice to make an agreement or not?

   Answer: There is no particular practice. What is done is done in accordance with custom.

7. per Mr. K. Muggleston: If it is agreed that a refund shall be made from the dowry of the recipient's daughter, and he dies without having a daughter, can the donor claim against the heir, and if so, to what extent? i.e. is liability limited to the assets of the estate, or is it for the full amount?

   Answer: If there was an agreement that the loan would be refunded from the dowry of a daughter and he dies without having a daughter but leaving an heir, according to custom the heir is liable for his father's debts, because after his father's death he steps into his father's shoes and he is burdened with all his father's liabilities irrespective of whether there are assets or not in the estate. He must make means in any other manner whatsoever to repay his father's debts. The reason why there was always been a girl appointed from whose dowry the debt will be paid is because it was always assumed that there will be a girl born of that union.

8. If a brother comes before a chief's court and is sued for a refund of the cattle contributed, will the man suing be expected to prove that there has been an agreement? i.e. would the Nkundla assume it was a gift unless the other man proved that there was an agreement to repay?

Answer: The man alleging the agreement would be expected to prove to the satisfaction of the court that there was an agreement. He would be asked "Was there an agreement to repay these cattle?"

Turning now to the previous decisions in regard to this custom, it is evident that there has been considerable controversy. In the case of Nobumba *v.* Mfecane 1911, 2 N.A.C. 104, the assessors in the Court of first instance stated that where relatives help with a beast for the dowry under the *Ukwenzelela* custom it is a gift, and there is no liability to return it. On appeal the assessors with the exception of one, who held there was no action in law under this custom, stated that the contributor expected a return. The President accepted the decision of the majority of the Native assessors in his Court, but it is noteworthy that the two European assessors dissented from this judgment.

In the case of Molo M.O. *v.* Gaga 1947 N.A.C. (C & O) 80 page 81, the President, Mr. Sleigh stated "It will be seen that the *Ukwenzelela* refers to the lending of cattle or its equivalent, to a man to enable him to pay dowry for a wife. The lender is entitled to a refund of the cattle lent, but only out of the dowries of the borrower's daughters. It appears however, that it has become a common practice to *stipulate* for a refund out of earnings or other income". To the extent then that the cattle are recoverable only from the dowries of daughters, unless there is an express stipulation of some other source, this agrees with the opinions of the assessors in the present case. However, he goes on to say in the next paragraph: "In any case the majority of the assessors make it clear that under the *Ukwenzelela* custom its lender is entitled to recover out of the assets of the estate in the absence of daughters." A perusal of this case will indicate that here again the assessros disagree. Makongolo from Idutywa and Mlata from Willowvale were of the opinion that "if a man helps his brother with payment of dowry, such stock is not recoverable, it is a gift". The other three assessors, who are presumably Fingos, held that "If I pay dowry for my brother I can recover, but only after he receives dowry for his daughter. If he dies without a daughter, his estate is liable".

The case of Sogoni and Ano. *v.* Gele 1947 N.A.C. 87 does not take the matter much further, for in that case the decision is based on a promise to pay and not solely on custom.

Finally, in the Umzimkulu case of Mpikwa *v.* Maqayekana 1949 N.A.C. (S.D.) 135, the President, Mr. Sleigh, relying on Molo's case (supra), makes the statement that "It frequently happens that a refund is never claimed and this had led to the belief that the contribution is a gift. It is not, and if refund cannot be made out of the dowries of daughters, the husband is expected to discharge his obligations out of other assets".

In view of the unanimous and unequivocal opinion of the seven asesssors in the present case as opposed to the conflicting opinions in the previous cases quoted, I must accept that at least amongst the Bomvanas, Gcalekas, Tembus and Ngqikas, cattle contributed towards dowry by relatives under the *Ukwenzelela* custom are a gift, unless there is an express stipulation to the contrary.

In view of the answer to question No. 3 which is amplified by the answer to question No. 7, it is quite clear that if an agreement had been made that the cattle should be refunded from the dowry of a daughter and the recipient died without having a daughter, the heir would be expected to refund the full amount, irrespective of the assets in the estate.

In the instant case plaintiff based his claim originally upon a promise to re-pay from the dowry of defendant's daughter. Defendant in his plea denied the agreement and secondly contended that in any case the amount was not repayable in the absence of daughters.

The decision come to was that the plaintiff was not entitled to recover his cattle because, according to the *Ukwenzelela* custom, it was a gift. The assessors make it clear that the decision is correct as far as it goes, but that the custom can be varied by agreement. This point was not at issue in the Court below, and it is therefore necessary that an opportunity should be given to lead evidence in regard to the alleged agreement.

The appeal is upheld and the judgment set aside. The case is remitted to the Court below for the hearing of evidence and judgment in the light of the facts found proved, and in view of what has been said above. By agreement between the attorneys who appeared in this Court, there will be no order as to costs.

For the information of the judicial officer, it should be pointed out that the judgment, dated 15th January, 1959, on the face of the record (which incidently has been altered but not initialled) differs from the judgment at the end of the case on page 14 of the original record and signed on 16th January, 1959. This Court has accepted that, despite the earlier date, the judgment on the face of the record is the correct one.

Pike and Potgieter, Members, concurred.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. R. Knopf, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MVELI *v.* SOLENDLINI.

N.A.C. CASE No. 30 OF 1959.

UMTATA: 23rd September, 1959. Before Yates, Acting President. Pike and Potgieter, Members of the Court.

NATIVE CUSTOM.

Lobola—*Merge of damages for seduction and pregnancy into dowry.*

Summary: During 1954 plaintiff (now respondent) seduced and rendered pregnant defendant's (present appellant) daughter. During the same year defendant gave his daughter in marriage to the son of one Bokotwana. She rejected this man as she was pregnant by plaintiff. Plaintiff thereupon paid 5 head of cattle as damages to defendant. Thereafter defendant again tried to give his daughter in marriage to Bokotwana's son but she again rejected him and went to live with plaintiff. Defendant then sued plaintiff in February, 1955, for the return of his daughter and the payment of a *twala* beast. In August, 1955, defendant accepted a *twala* beast from the plaintiff and thereafter ascented to the plaintiff's offer of marriage to his daughter and accepted 7 head of cattle as dowry. During 1957 plaintiff's wife left him and returned to her father's kraal. Plaintiff thereupon sued for the return of the 5 head of cattle and the £5 originally paid as damages, the *twala* beast and the 7 head of cattle subsequently paid as dowry, less the customary deductions. To this the defendant pleaded *inter alia* that the 5 head of cattle paid as damages and the *twala* beast dit not merge into the dowry paid for his daughter.

Held: That the payment of damages, the payment of the *twala* beast and the subsequent offer and acceptance of marriage with the payment of a further 7 head of cattle as dowry was one continuous transaction and consequently the amount paid in damages merged with the dowry paid for defendant's daughter.

Cases referred to:

Mampondo *v.* Manqunyana 4 N.A.C. 67.

Memami *v.* Makaba 1950 N.A.C. (S.D.) 178.

Mtshiywa *v.* Bhakile 1940 N.A.C. (C & O) 21.

Appeal from the Court of the Native Commissioner at Elliotdale.

Yates (Acting President).

In this case summons was issued by plaintiff (present respondent) against defendant (present appellant) for the return of his wife Nontsikelelo or restoration of the returnable dowry, or their value. Defendant denied liability and in his plea made various allegations against plaintiff, which were later withdrawn.

No evidence was led, but at the hearing the parties agreed as follows:—

"1. The said Nonsikelelo is not prepared to return to plaintiff.

2. The plea that Nonsikelelo was rejected and driven away by witchcraft is hereby abandoned.

3. In 1954 plaintiff seduced and caused the pregnancy of Nonsikelelo.

4. In the same year defendant gave Nonsikelelo in marriage to son of Bokotwana but the customary union was not consumated as she rejected this son of Bokotwana as she was then pregnant by plaintiff.

5. Plaintiff thereupon paid 5 head of cattle as damages to defendant.

6. Thereafter defendant again tried to give Nonsikelelo in marriage to the son of Bokotwana but she ran away from Bokotwana's kraal to plaintiff.

7. In February, 1955, defendant sued plaintiff, case 20/55, for—

(*a*) a beast for *twala* of Nonsikelelo or £5;

(*b*) the return of Nonsikelelo.

8. Plaintiff pleaded that he had not twalaed Nonsikelelo but that she had come to him on her own accord and was living with him and he wished to marry her.

9. On 5th August, 1955, judgment was entered by consent for a beast or £5 in favour of present defendant.

10. Thereafter a further 7 head of cattle were paid as dowry.

11. A wedding outfit was supplied.

12. The parties agree in regard to the 7 head of cattle, that certain 5 head of cattle, viz.—

(*a*) a black Rwexukazi cow;

(*b*) a black cow;

(*c*) a red Inkoni bull;

(*d*) a red Intusi bull calf, a progeny of (*a*);

(*e*) a red Ntusikazi hiefer, progeny of (*b*);

are offered and accepted at value of £18 each.

The legal point in issue is whether the 5 head paid as a seduction fine is merged with the dowry paid and thus refundable or whether it forms a separate payment and not refundable."

Judgment was given in favour of plaintiff in the following terms:—

"For plaintiff for the return of his wife Nonsikelelo within one month from date of Judgment failing which the customary union existing between plaintiff and Nonsikelelo is dissolved and defendant to return the five specific head of cattle as admitted or value £18 per head and the further return of the 5 head of cattle paid as fine which merge as dowry or value £8 per head and the £5 paid as *twala,* and costs."

Against this judgment:—

"The Appeal is noted against that part of the Judgment dealing with the 5 head of cattle originally paid as damages for seduction and pregnancy and the £5 paid for *twala.*

The grounds of appeal are that—

(*a*) the merger of the 5 damages cattle paid, into the dowry is contrary to Native Law and Custom in that at the time of the payment of the damages, there was no agreement as to marriage;

(*b*) at the time of payment of the damages the girl in question was betrothed to a third party with whom arrangements for a customary union had been concluded;

(*c*) the *twala* beast or its equivalent £5 paid would not, in any case, merge in the dowry paid;

(*d*) in the Elliotdale District the value placed on a beast paid for seduction and pregnancy is £5 and in the case of dowry £8 and that the Judicial Officer erred in placing the value of the said 5 head of cattle paid as damages of £40 instead of £25."

Although the admitted facts do not give an entirely clear picture of all the relevant details of this case, the main aspects are plain and the principal "legal" point in issue is whether or not the seduction fine merges with the dowry.

In his reasons for judgment, the judicial officer has pointed out that there have been inconsistent decisions in this regard and he has analysed these decisions in some detail. The case of Mampondo *v.* Manqunyana 4 N.A.C. 67 and Memami *v.* Makaba 1950 N.A.C. 178 (S.D.) strongly support the conclusion that he has come to viz. that where a fine is paid for the seduction and pregnancy of a girl and thereafter additional cattle are paid and a marriage takes place, the fine merges into dowry.

It was strongly contended by Mr. Knopf who appeared for appellant, that unless marriage was offered at the time of payment of the fine, i.e. if there was a delay between the seduction and offer of marriage, the fine does not merge into dowry, and for this he relied on Seymour "Native Law in S.A." at the bottom of page 93. He also contended that the judicial officer was wrong in coming to the conclusion that the payment of the fine, the payment of the twala beast, and the subsequent offer and acceptance of marriage with payment of a further 7 head of cattle as dowry, was one continuous transaction. However, in the view of this Court, there can be no doubt that this was one continuous transaction. Plaintiff seduced and rendered Nontsikelelo pregnant some time in 1954. The girl's father (defendant) then tried to marry her to a son of Bokotwana, but she was very naturally rejected as she was then pregnant by plaintiff. Thereafter plaintiff paid damages of 5 head, and when

in that same year or very early in 1955, defendant again tried to give Nonsikelelo in marriage to Bokotwana's son, she ran to plaintiff's kraal. Then in February, 1955, when he was sued for a twala beast, plaintiff pleaded that she was living with him and he wished to marry her. In August of that year defendant accepted a twala beast and thereafter a further 7 head of cattle were paid as dowry and a wedding outfit was supplied. One can therefore come to no other conclusion but that this formed one continuous transaction, and was certainly not such a delay as would nullify the merging of the fine into dowry.

With regard to the second point taken on appeal, i.e. "that the twala beast or its equivalent £5 would not in any case merge into dowry", the authorities quoted by the Native Commissioner and the case of Mtshiywa *v.* Bhakile 1940 N.A.C. (C. and O.) 21 indicate quite clearly that in the circumstances of the present case, it does.

In regard to the third point of appeal, defendant has contended that in the Elliotdale District, a beast paid as a fine is valued at £5, whereas a beast paid as dowry is valued at £8, and that if the fine merged into dowry the value of the cattle originally paid as a fine, should remain at £5.

The presiding officer held that as the Court had accepted that the fine cattle had merged into dowry, their price should be fixed at the accepted value of dowry cattle, viz. £8, and with this contention I am in agreement. When defendant married his daughter to plaintiff, he knew that the fine cattle would merge into dowry. If the cattle are still in existence, the defendant has the option of returning them.

In the result then, the appeal is dismissed with costs.

Pike and Potgieter, Members, concurred.

For Appellant: Mr. R. Knopf, Umtata.

For Respondent: Mr. K. Muggleston.

SOUTHERN NATIVE APPEAL COURT.

NGWANE *v.* VAKALISA.

N.A.C. CASE No. 35 OF 1959.

KINGWILLIAMSTOWN: 29th October, 1959. Before Yates, Acting President, Welman and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Interpretation of word "person" *in rule* 73 (a) *of Rules for Native Commissioner's Courts.*

Summary: The defendant personally was in default at the hearing of an action for damages in a Native Commissioner's Court. The defendant's attorney, however, elected to proceed with the case in the absence of his client, and judgment was subsequently given in favour of the plaintiff. A subsequent application for the recission of the judgment on the grounds that in terms of rule 73 (*a*) it was given in the absence of the person against whom the judgment was granted (in this instance the defendant) was refused by the Native Commissioner. It was against this ruling that the appeal was brought.

Held: That, it is clear from the rules for Native Commissioner's Courts and the "interpretation of terms" (Rule 96), that the parties to an action are the plaintiff, defendant, applicant, respondent and the legal representatives thereof. Rule 73 (*a*) is clearly designed to cover a wider field and to include any person whose rights might be affected by a judgment given

in his absence and this view is strengthened by the wording of Rule 74 (10). If this view is accepted then the greater includes the less, i.e. the word "person" includes "party" and this as pointed out above includes the attorney acting for such person.

Cases referred to:

Sgatya *v.* Madleba, 1958, N.A.C. (S) 53.

Kagan & Co. *v.* Gunther's Store S.A.L.R., 1955 (2) 618.

Serfontein *v.* Bosch (1930, O.F.S. reports).

Nzimande *v.* Miya, 1941, N.A.C. (T & N) 31.

Du Plessis *v.* Goldblatt Wholesalers (Pty.), Ltd., 1953 (4) S.A. 112.

Bhengu *v.* Jasset and Others S.A.L.R., 1949 (1) 462.

Yates (Acting President).

This case emanated from the Native Commissioner's Court, Alice, and the first aspect to be dealt with is an application for condonation of late noting of the appeal. This notice of Appeal was lodged and the deposit paid timeously but the notice was not stamped. As the appellant was in no way to blame for this omission on the part of his attorney and good cause having been shown, the application is granted. See Sgatya *v.* Madleba, 1958, N.A.C. 53 (S).

Mr. Heathcote, who appeared for respondent, argued that the application for rescission was brought only under Rule 73 (*b*) of the Rules for Native Commissioner's Courts (Government Notice No. 2886 of 1951), which provides for the rescission of a judgment void *ab origine*.

Mr. Traub, for appellant, contended that this was a typographical error and should have read Rule 73 (*a*). He also stated, and this is borne out by the record, that it was accepted in the court *a quo* that the application was in effect brought on two grounds, viz. firstly, that the judgment was void *ab origine* as the summons had lapsed and, secondly, that it was a judgment granted in the absence of the person against whom that judgment was granted. The appeal was heard on this basis.

Turning now to the appeal itself; summons was issued on the 27th September, 1957, against defendant (present appellant) for the payment of £500 damages for seduction and pregnancy of plaintiff (present respondent) and £5 per month for maintenance of the resulting child from the date of birth, 16th August, 1957, until the child reaches the age of 21 or sooner becomes self-supporting. Notice of Appearance to Defend "only as far as the amount is concerned" was lodged on the 22nd November, 1957. On the 30th September, 1958, Notice of Trial was filed and the plea which denied the alleged seduction and alternatively stated that the amount claimed was excessive, is dated 1st April, 1958.

At the hearing on 6th January, 1959, Mr. Burl, for defendant, intimated that notwithstanding telegraphic and registered written advice of the date of trial, defendant was absent but he was prepared to go on with the case. After plaintiff had called witnesses and closed his case, Mr. Burl closed defendant's case without leading evidence. The Native Commissioner then gave judgment "for plaintiff for £350—Damages and an order upon defendant to pay maintenance of £5 per month with effect from 16th August, 1957, and until such time as child becomes of age or self-supporting—whichever occurs first. Costs to plaintiff". On the 30th January, 1959, attorney I. M. Bawa of Durban on behalf of defendant applied for the rescission of the judgment and stay of execution pending the hearing. The application for rescission was heard on 9th July, 1959, and refused in the following terms "Application to have Summons declared invalid as

having lapsed in terms of Rule 92 as also application for rescission of judgment granted on 6th January, 1959, refused with costs to respondent". Against this judgment an appeal has been lodged on the grounds:—

"1. The Native Commissioner erred in law in holding—

(*a*) that judgment was not given on the 6th day of January, 1959, in the absence of the person against whom that judgment was granted;

(*b*) that the word 'person' in Rule of Court 73 is equivalent to the word 'party' and includes a person's legal representative.

2. The Native Commissioner ought, in the circumstances, to have exercised his discretion in favour of the Applicant and rescinded the judgment of the 6th day of January, 1959, in terms of Rule 73 of the Native Commissioner's Court."

Originally two grounds were advanced why the judgment should be rescinded. Firstly that the summons had lapsed in terms of Rule 92 in that the plaintiff had not within twelve months after the date of issue of the summons, taken further steps to prosecute the action. Mr. Traub, who appeared for applicant, however, did not press the point in view of the decision arrived at in the case of Kagan & Co. *v.* Gunter's Store S.A.L.R., 1955 (2) 618.

Secondly that Rule 73 provides that the court may upon application by any person affected thereby, rescind any judgment granted by it in the absence of the person against whom that judgment was granted. It must be stressed that the judgment given by the Native Commissioner originally was not really a default judgment, for a default judgment is defined in Rule 96 as being "a judgment given in the absence of the party against whom it is given" and the word "party" here includes the attorney appearing for such "party". This judgment was, therefore, not given in the absence of the party against whom it was given and therefore does not fall within the definition of "default judgment". See case of Serfontein *v.* Bosch (1930 O.F.S. reports) quoted in Mzimande *v.* Miya, 1941, N.A.C. (T. & N.) 31, and also Du Plessis *v.* Goldblatt Wholesalers (Pty.), Ltd., 1953 (4) S.A. 112.

According to the record, Mr. Traub conceded that applicant was not in default in the technical sense of the word. The grounds of appeal in this case are not stated very clearly but, as I understand the position, this appeal is on the ground that in terms of Rule 73, the Court may rescind a judgment granted by it in the absence of the *person* against whom that judgment was granted. It is contended that "person" means defendant himself and cannot be extended to mean "party" which would include the attorney for the defendant. This question as it affects the relevant provisions of the Magistrate's Court which are identical, is discussed in Bhengu *v.* Jasset and Others S.A.L.R. 1949 (1) 462, but no decision is reached, vide Jones & Buckle at page 114.

It is clear from the rules and the "interpretation of terms" (Rule 96) that the "parties" to an action are the plaintiff, defendant, applicant, respondent and the legal representative thereof.

Rule 73 is clearly designed to cover a wider field and to include any person whose rights might be affected by a judgment given in his absence and this view is strengthened by the wording of Regulation 74 (10). If this view is accepted then the greater includes the less, i.e. the word "person" includes "party", and this, as pointed out above, includes the attorney acting for such person. If this is so then it is clear that the Native Commissioner had no power to rescind the judgment because it was not granted in the "absence of the person". The Native Commissioner was, therefore, not wrong in refusing the application for rescission.

The appellant is bound by his grounds of appeal and the question of the quantum of damages has not been raised and can, therefore, not be considered by this Court. The sole ground of appeal is that in the circumstances of the case the Native Commissioner should have exercised his discretion and granted an application to rescind the judgment. In my view, the Native Commissioner did not have a discretion and the judgment must, therefore, be upheld.

The appeal is dismissed with costs.

Welman and Leppan, Members, concurred.

For Appellant: Advocate G. Traub, Grahamstown.

For Respondent: Mr. E. M. Heathcote, King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

MDLALOSE *v.* SIKAKANE.

N.A.C. CASE No. 17 OF 1959.

ESHOWE: 31st July, 1959. Before Menge, President, Vosloo and Doran, Members of the Court.

NATIVE LAW.

Sisa.—Liability of borrower for stock losses.

PRACTICE AND PROCEDURE.

Appeal from Chief's judgment.—Native Commissioner's powers in absence of cross-appeal.—Calling chief as witness.

Summary: Plaintiff sued defendant for the return of twelve head of *sisa* stock before a chief who awarded him seven head. Defendant's appeal to the Native Commissioner failed but the Native Commissioner increased the chief's award to eleven head although there was no cross-appeal. The chief was called as a witness in order to show that the defendant had before him made an offer to pay to plaintiff four head of cattle. Defendant appealed further.

Held: The plaintiff's claim was not based on *sisa* at all but on a promise to pay in cattle.

Held further: Sisa stock which die need not be replaced by the borrower unless it can be shown that there was negligence on his part.

Held further: A chief's evidence concerning the proceedings in his court can only be admissible in the rare instances where it concerns a point actually in issue or relevant to the issue in dispute between the parties at the time.

Semble: A chief's judgment can only be altered on appeal in so far as it has been appealed against.

Cases referred to:

Hlongwane *v.* Hlongwane, 1956, N.A.C. 86.

Makoba *v.* Makoba, 1945, N.A.C. (T. & N.) 29, queried.

Allie *v.* Regina, 1959 (1), P-H.L. 1.

Statutes referred to:

Section 12 (4) of the regulations for Chief's Courts, Government Notice No. 2885 of 1951.

Appeal from the Court of Native Commissioner, Mahlabatini.

Menge, President.

This appeal concerns an action in which plaintiff sued defendant for twelve head of cattle being two *sisa* animals and their increase of eight plus two animals lent to defendant, the one to pay *lobolo* with and the other to slaughter at a qholisa ceremony. The defendant denied having received the cattle. The parties were not represented. The Native Commissioner heard the matter as an appeal from a chief who had awarded plaintiff seven head of cattle plus 30s. costs. The Native Commissioner dismissed the appeal but increased the judgment to one for eleven head of cattle. The defendant now appeals further. He attacks the judgment on the facts and on two grounds stated as follows:—

> "(1) The Court erred in calling the Chief as a witness and in considering his evidence in arriving at its findings.
>
> (2) The Native Commissioner erred in increasing the number of cattle awarded by the chief to the plaintiff in the absence of a cross appeal."

The notice of appeal goes on to say that—

> "in any event the plaintiff's claim as stated before the Court at the commencement of the case, was not consistent with his claim before the chief's court."

There is no substance in this ground of appeal. The claim was in essence the same in both courts, viz. for 12 head of cattle, but the particulars thereof were given more fully before the Native Commissioner. Before the chief the claim as recorded was for "the return of twelve head of cattle the said cattle being the increase of one original beast *sisaed* to defendant". This setting out of these versions of the claim in the Chief's and Native Commissioner's Courts certainly has not caused any prejudice.

The view we have taken of this appeal makes it unnecessary to give a decision on the question which Mr. Kent urged strongly before us in argument on ground (2) above, that in an appeal from a chief's court, there being no special provision for cross-appeals or even for stating grounds of appeal, the Court is at large to increase an award even when there is no cross-appeal; but it seems to me that this proposition entails a basic fallacy: namely, that a Native Commissioner can adjudicate on issues which the parties have not placed before him. It also loses sight of the fact that a chief's judgment is *res judicata* between the parties to the extent to which it has not been appealed against.

In regard to ground No. (1) above the Native Commissioner says in his reasons for judgment:—

> "I called Chief Mhlolutini Mbata in order to find out what defendant had actually admitted . . . It is submitted that there was no irregularity in calling the Chief. On the contrary it was very necessary to find out what had been said in order to get to the bottom of the dispute." [In regard to this submission it should be noted that argument is out of place in reasons for judgment, see Allie *v.* Regina, 1959 (1) P-H.L. 1].

This question of calling a chief who has tried a case as witness before the Native Commissioner on appeal has been dealt with before in this Court, see Hlongwane *v.* Hlongwane, 1956, N.A.C. 86, which was cited in argument before us and Makoba's case referred to therein. In the latter case McLoughlin (President) stated that it was irregular to call a chief except in "special circumstances, where, e.g. it is contended that one of the witnesses made a contrary statement in his court to that made in the Native Commissioner's Court". With respect, even then the chief's evidence would be inadmissible on the ground of irrelevancy. A chief's court is not a court of law much less a Court of record. It would not be known in what circum-

stances and with what motive the alleged statement before the chief was made; and it would not be a statement under oath. Therefore, what was said before the chief is quite irrelevant to the case which the Native Commissioner has to try in terms of Section 12 (4) of the Regulations "as if it were one of first instance". A chief's evidence concerning the proceedings in his court can logically only be admissible if that point is in issue or relevant to the issue in dispute between the parties; but it is somewhat difficult to imagine a case in point—save, perhaps, where there is a specific allegation of illegality or gross irregularity on the part of the chief. Where the question in issue is, for instance, whether or not a certain person was present at the trial before the chief, it would no doubt be possible to call the chief to clear up that point, but that would hardly be a question concerning the proceedings in the chief's court.

But be this as it may, in the cases now before us there is no question of any admission by the plaintiff. The chief states as follows in his reasons for judgment:—

> "In his evidence defendant first denied that there are any cattle in his possession which are plaintiff's lawful property. Later on defendant said that he offers to give plaintiff four head of cattle. When cross-examined by Court on this, he said that he offers to give plaintiff four head of cattle because he sympathises with plaintiff because plaintiff had left his work to come and sue for the cattle. This behaviour of defendant showed that his conscience was not clear."

Plaintiff is to the same effect. He said:—

> "In the chief's court defendant said he was prepared to give me four head of cattle. He said he was sympathetic towards me because I had had to leave my employment for this case."

The defendant did not admit anything at all. He made an offer of compromise which, in the result, was not accepted and which therefore does not bind him any longer.

It is clear, therefore, that in this case at any rate the evidence of the chief should not have been taken. In assessing the weight of the rest of the evidence it is consequently necessary to disregard the chief's evidence and the defendant's so-called admissions. When that is done precious little remains; so little in fact that the Native Commissioner was unable "to get to the bottom of the dispute".

Plaintiff is a man of approximately 50 years of age. The loan was made before 1925. Plaintiff said he does not know how many years before that. He must have been a young lad of 15 years or less at the time and could hardly have concluded a *sisa* transaction. Then again, there is no corroboration of plaintiff's very slender evidence as regards the increase in the stock. But his main difficulty is that he himself stated that defendant told him that all the *sisa* stock had died and that the skins are there for his inspection. He did not inspect the skins, however, because, he said, the defendant had promised to pay back the cattle lent. Now, *sisa* stock which die need not be replaced by the borrower unless there has been negligence on his part. Here negligence on the part of defendant has not been alleged. The plaintiff's real cause of action is, in fact, not a contract of *sisa* at all but a promise to pay. Apart from the fact that the evidence concerning such a promise is vague and conflicting, that is not the case which defendant was required to defend according to the pleadings. Plaintiff's case as regards the *sisa* stock has therefore not been proved.

As regards the other two animals the plaintiff's case is equally weak. His one witness to the transaction must have been less than 10 years old at the time of the loan, and, as stated, plaintiff himself could hardly have been 15 years old yet. His only other witness is a woman who would have been about 20 at the time but whose evidence is nothing but a bare allegation. As against

this there is the defendant's denial of the loan and the evidence of his half-brother, older than himself, who lived in the same kraal as defendant and who denied that such a transaction ever took place.

This Court has often laid down that although prescription does not operate where Native law is concerned, if very old matters such as this are raked up they must be supported by clear evidence, not mere allegations such as in this case. And there must be some satisfactory explanation for the delay in bringing the claim.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read as follows: "Appeal allowed and chief's judgment altered to one of absolution from the instance with costs".

Vosloo, Member:—

I agree with the judgment of the learned President but in regard to the views expressed on ground 2 of the appeal, I do not wish to express an opinion until I have had the opportunity of further considering the issue.

Doran, Member: I agree with the judgment of the President.

For Appellant: W. E. White, Eshowe.

For Respondent: H. H. Kent, Eshowe.

NORTH-EASTERN NATIVE APPEAL COURT.

MTETWA *v.* GUMEDE AND ANOTHER.

N.A.C. CASE No. 27 OF 1959.

ESHOWE: 29th July, 1959. Before Menge, President, Vosloo and Doran, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Appeal Court.—Appeal against a judgment of a "Bantu Affairs Commissioner" in a "Bantu Affairs Commissioner's Court".

Summary: In a suit for damages the proceedings appealed from were, according to the record, conducted in all respects in a Court of Bantu Affairs Commissioner. The notice of appeal, too, was headed "In the Court of the Bantu Affairs Commissioner . . ." and the appeal is noted against the judgment of the "Bantu Affairs Commissioner . . .".

Held (by the Court *ex mero motu*): That the Native Appeal Court has no jurisdiction to hear the appeal, and that no valid judgment has as yet been given in the case.

Held further: That the respondent was not entitled to costs as his opposition to the present appeal rested and must of necessity have rested on the mistaken assumption that there was a valid judgment.

Statutes referred to: Section 15, Act No. 38 of 1927.

Appeal in proceedings conducted before the Bantu Affairs Commissioner, Mtunzini.

Menge, President.

In this matter plaintiff sued the two defendants in the Native Commissioner's Court jointly and severally for £501. 4s. damages arising out of an alleged assault. Judgment was entered for defendants with costs. Plaintiff now seeks to appeal on the facts.

It is not possible to go into the merits of the case. The judgment given is not a judgment at all, because a valid judgment in a civil case between Natives can only be given by a Native Commissioner, see Rule 54 of the Rules for Native Commissioner's Courts read with the definition of "court". Here, however, the officer who gave the judgment designates himself

"B.A.C." which presumably stands for Bantu Affairs Commissioner. The reasons for judgment; the further reasons and the certificate of correctness of the record are all signed "Bantu Affairs Commissioner" and they are formally headed "In the Court of the Bantu Affairs Commissioner for . . .". These documents consequently have no more legal value than the judgment has.

But the appeal itself cannot be entertained. This notice is also headed "In the Court of the Bantu Affairs Commissioner . . ." and it goes on to say that "an appeal is hereby noted against the whole of the written judgment of the learned Bantu Affairs Commissioner . . .". This Court has no jurisdiction to hear such an appeal; that is clear from Section 13 of the Native Administration Act, 1927.

We have not overlooked the provisions of Section 15 of the Act, and the possibility of condoning these irregularities in the record as non-prejudicial and unimportant. Unfortunately such a course is not possible. In the first place Section 15 can only come into question if the judgment or proceeding concerned is that of a Native Commissioner's Court. Secondly, if we were to come to the conclusion that the decision was wrong on the merits and that the damages claimed or some damages should have been awarded, we would not be able to do anything about it. For if we were to alter the judgment to one awarding damages it would still be a judgment of a Bantu Affairs Commissioner, which the defendants can ignore and on which no valid writ of execution could ever be issued; and we cannot alter the designation to that of Native Commissioner without arrogating to ourselves original jurisdiction and usurping the functions of the Native Commissioner. On the other hand, if we were to uphold the decision as correct, the plaintiff could simply sue again and the defendant would not be able to plead *res judicata*.

It is unfortunate, but there is no judgment as yet. The case has actually not progressed beyond the stage when the evidence was closed. That being so, and as there is no valid appeal before us we can only strike the matter off the roll. In regard to costs any opposition of the respondent to these proceedings must of necessity rest on the mistaken assumption that he holds a valid judgment. In the circumstances the matter is struck off the roll with no order as to costs.

Vosloo and Doran, Members, concurred.

For Appellant: M. M. Schreiber, Empangeni.

For Respondent: H. H. Kent, Eshowe.

NORTH-EASTERN NATIVE APPEAL COURT.

SIKAKANE *v.* SHANDU.

N.A.C. CASE No. 29 OF 1959.

ESHOWE: 30th July, 1959. Before Menge, President, Vosloo and Doran, Members of the Court.

NATAL CODE OF NATIVE LAW.

Dissolution of customary union.—Order for refund of lobolo *where such is not claimed.*

PRACTICE AND PROCEDURE.

Appeal—Notice omitting to state what part of judgment is appealed against.—Powers of Native Appeal Court to condone this omission.

Summary: Respondent sued his wife by customary union and her father for dissolution of the union and costs. The Native Commissioner granted the dissolution and ordered *inter alia*

that eleven head of *lobolo* cattle be refunded although no such claim had been made. The defendant intended to appeal against the latter order, but his notice of appeal omitted to state specifically which part of the judgment was appealed against.

Held: The Native Appeal Court has the power in a suitable instance to condone the omission to specify what part of a judgment is appealed against.

Held further: A Native Commissioner's Court cannot adjudicate on a claim which is not contained in the pleadings before him.

The meaning of Sections 81 and 83 of the Natal Code discussed.

Statutes referred to:

Sections 11 (3) and 15, Act No. 38 of 1927.

Sections 80, 81 and 83 of Proclamation No. 168 of 1932 (Natal Code).

Cases referred to:

Bornman *v.* Christiana Furnishers, 1958 (4) S.A. 405, distinguished.

Kumalo *v.* Kumalo, d.a., 1947, N.A.C. (T. & N.) 107, not followed.

Masoka *v.* Mcunu, 1951, N.A.C. 327 (N.-E.).

Xulu *v.* Mtetwa, d.a., 1947, N.A.C. (T. & N.) 32, approved.

Appeal from the Court of Native Commissioner, Nkandhla.

Menge, President.

Before the Assistant Native Commissioner plaintiff sued his wife (defendant No. 1) and her father (defendant No. 2) for "dissolution of Customary union and costs". The particulars of claim are set out as follows:—

"(1) Plaintiff and defendant No. 1 were married by Native law and custom approximately ten years ago.

(2) Sixteen head of cattle and £12 cash were paid as full lobolo.

(3) There are two children alive of the union.

(4) Plaintiff prays for the dissolution of the customary union existing between the parties on the grounds of defendant No. 1 having committed adultery on two occasions with person or persons unknown to plaintiff. Two children were born of the adultery, one of which died yesterday (the 15th January). Further, plaintiff avers that in any case the living together of the parties is dangerous and unsupportable."

A plea by defendant No. 1 only is recorded. It reads: "1. Admits paragraphs 1, 2, 3 and 4 of summons."

Some evidence was given and thereupon the Assistant Native Commissioner gave judgment as follows:—

"(1) It is ordered that the customary union subsisting between plaintiff and defendant No. 1 be and is hereby dissolved.

(2) That defendant No. 1 shall return and remain in the kraal of her guardian until remarried.

(3) That defendant No. 2 shall refund to plaintiff 11 head of cattle.

(4) Defendants to pay costs."

The second defendant noted an appeal "against the judgment in the above matter" on grounds which concern only the order for the refund of cattle. The first of these reads:—

"The learned Native Commissioner erred in ordering the second defendant to refund to plaintiff 11 head of cattle in that *ex facie* the Summons there is no claim against the second defendant for the return of cattle."

In the Supreme Court the view has been expressed that a notice of appeal which fails to state whether the whole or part only of the judgment or order is appealed against, and, if part only, then what part, is not valid [see Bornman *v.* Christiana Furnishers, 1958 (4) S.A. 405 at 407]. But that is probably not strictly applicable in the case of the Native Appeal Courts because Section 15 of the Native Administration Act, 1927, seems to confer upon us an overriding discretion in these matters. In this instance, at all events, it is reasonably clear that the appeal is directed solely against paragraph (3) of the judgment.

The appeal was noted just over a week late but there is an application for condonation of the late noting, and it appears that the applicant did set appeal proceedings in motion without undue delay. We have, therefore, condoned the late noting.

The Assistant Native Commissioner states that he made the order for the refund of the cattle because he considered that the provisions of Section 81 of the Natal Code of Native Law are imperative. It is not clear what this section means. How, in actual practice, is a dissolution of a customary union "accompanied by" the return of a beast? Suppose that the woman's father does not possess a beast or its equivalent, or suppose he refuses to part with the same; does that mean that the husband cannot obtain a decree of divorce? Section 81 has to be read with Sections 80 and 83, and the question arises whether it is possible for an order for the refund of *lobolo* to be made when, as in this case, no such refund has been claimed.

In Stafford & Franklin's book *Principles of Native Law* the opinion is expressed that the provisions of Section 83 are imperative, and the authority cited therefor is a 1930 case, which must have dealt with the somewhat analogous provisions of the former code (Section 169). So far as I am aware this case was not published. It is registered as Mzanywa Ngiba *v.* Mfungwase, 11th January, 1930, but the original cannot be found.

Whatever may have been the position under the former Code it seems that, with the possible exception of paragraph (*b*), Section 83 of the present code does not mean anything at all. In Kumalo *v.* Kumalo d.a., 1947, N.A.C. (T. & N.) 107, it was held in a brief judgment, without giving any reasons, that paragraph (*a*) has to be complied with. But one would have thought that guardianship of a woman is a matter of law largely governed by Section 11 (3) of the Act, not of "explicit orders and directions," and her place of residence is entirely her own affair.

However, as regards paragraph (*c*) which is here in point, it has been laid down in this Court that an order of return of *lobolo* can only be made if that point is in issue; (and if it is in issue then, surely, there is no need for any statutory direction that the Court must give a decision thereon). In Masoka *v.* Mcunu, 1951, N.A.C. 327 (N-E) it was held that the matter of refund of the *lobolo* was not in issue in as much as one of the parties concerned in that claim was not before the Court. In Xulu *v.* Mtetwa, d.a., 1947, N.A.C. (T. & N.) 32, Steenkamp (President) said: ". . . it is no concern of the Court if a husband does not wish to claim return of *lobolo* and I emphasise the fact that if a husband so wishes to abandon any right he might have for refund of *lobolo,* the Court cannot of its own motion say that notwithstanding the absence of the claim it nevertheless will adjudicate and give a decision as to the number of cattle returnable". That is precisely the position here. There is no claim for the refund of *lobolo* and no plea. It follows that no order should have been made thereanent.

The appeal is allowed with costs and paragraph (3) of the judgment of the Native Commissioner relating to a refund of 11 head of cattle is deleted.

Vosloo & Doran, Members, concurred.

For Appellant: M. M. Schreiber, Empangeni.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

NGCAMU *v.* MAJOZI d/a ZONDI.

N.A.C. CASE No. 54 OF 1959.

PIETERMARITZBURG: 16th November, 1959. Before Ramsay, President, King and Richards, Members of the Court.

CONFLICT OF LAWS.

Seduction—Minor suing under Common Law—proper guardian—Cognisance taken in suit under Common Law of Native Custom.

Summary: In an action in which a tribal minor female sued for expenses and damages for seduction under Common Law, assisted by a nominee of her guardian under Native custom.

Held: That although the action was tried under Common Law, the minor's guardian according to Native custom was entitled to assist her in court.

Cases referred to:

Davids *v.* Pullen & Others, S.A.L.R. 1958 (2), 405.

Rex *v.* Rantsoane, S.A.L.R. 1952 (3), 281.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Ramsay, President.

In this case the appeal was lodged on the 30th July, 1959, judgment having been given on the 16th February, 1959.

The appeal was accompanied by a prayer for condonation of the late appeal and it was given as the reason that on the 26th February, 1959, the appellant's attorney requested the Clerk of the Court to obtain reasons for judgment as provided by the rules. A reminder was sent to the Clerk of the Court on the 5th March and this official replied on the 6th March. On the 7th March the Clerk of the Court again wrote the appellant's attorney stating that as soon as he received the reasons (apparently from the judicial officer who had been transferred) he would furnish a copy.

Nothing was done until the 17th July, 1959, when the Clerk of the Court inquired whether appellant's attorney intended proceeding with his appeal. The reasons for judgment were eventually received by the appellant's attorney on the 20th July, 1959, and, as stated, he lodged his appeal on the 30th of that month.

The appellant's attorney was clearly at fault for not noting his appeal timeously, irrespective of there being undue delay by the Clerk of the Court or the judicial officer. He took no action whatsoever between the 7th March and the 17th July, 1959. Realising that his time within which to note an appeal was becoming limited, he could have noted an appeal, giving general grounds and then, after receiving the reasons for judgment, have amended those grounds. This is, therefore, *a priori* not a condonable default.

It remains to inquire whether the appeal has any reasonable prospects of succeeding. With the exception of one ground of appeal, it has not. That one ground, on which counsel were heard, is whether the plaintiff, a minor Native female, had any *locus standi in judicio* to appear in Court and sue.

She sued under Common Law and is described in the summons as "Alzina Majosi d/a by Kipa Zondi". Plaintiff averred in evidence that Kipa Zondi is her guardian and was assisting her in the action. It transpired, however, that Kipa Zondi is not the

girl's guardian by Native law but that the guardian is Mnyameni Majozi. Kipa Zondi stated in evidence—"Have authority from him to act in (this) matter. He was at Court this morning. Spoke to him. He was satisfied action (be) proceeded with". It was also established that the plaintiff had lived with Kipa Zondi since early childhood.

Defendant's counsel quoted from Common Law authorities to show that a minor, in suing or being sued, must be duly assisted by her legal guardian or by a *curator ad litem* and urged that this requirement is imperative. The Courts have, however, in the past allowed variations to this requirement. In Davids *v.* Pullen & Others, S.A.L.R., 1958 (2), 405, a married woman who was sued in her own name, unassisted, was, on appeal held to be correctly sued on the grounds that her husband had at all times known of the proceedings and had signed certain documents in connection therewith.

It was also contended that Mnyameni Majozi was not the girl's guardian by Common Law and that, as the case was tried under Common Law, this is fatal. This Court cannot agree with that contention. A Native minor cannot have two guardians under two systems of Law. Her guardian is the person recognised as such by the system generally pertaining to the minor.

In Rex *v.* Rantsoane, S.A.L.R., 1952 (3), 281, Native custom was recognised by the Court as having effect on a statutory enactment. In the matter of orders for maintenance of illegitimate Native children in terms of Transvaal Ordinance, No. 44 of 1903, the Court drew attention to a Native custom whereby, among some tribes the duty of support of an illegitimate child rests on its maternal grandfather, and ruled that where this custom applies a maintenance order could not legally be made against the natural father. This decision was followed by the Orange Free State Division.

This Court accordingly holds that Mnyameni Majozi is the plaintiff's legal guardian and that he was entitled to delegate Kipa Zondi to assist her in her action. The girl had reached the age of discretion and the assistance by Kipa Zondi was purely nominal.

This ground of appeal must therefore fail.

If this Court condoned the late appeal on this purely technical ground, it would merely mean that the case would have to be re-commenced in the proper form with consequent further expense. The cause of action is clear and is supported by the evidence.

The application for condonation is accordingly refused with costs.

King and Richards, Members, concurred.

Mr. A. M. Brokensha for Appellant.

Adv. J. Strydom for Respondent.

CENTRAL NATIVE APPEAL COURT.

MFULLWANE AND OTHERS *v.* DITSELE AND OTHERS.

N.A.C. CASE No. 25 OF 1957.

JOHANNESBURG: 20th February, 1959. Before Cowan, President, Smithers and Gafney, Members of the Court.

PRACTICE AND PROCEDURE.

Court of Native Commissioner—Failure to obey Court order—Court has no inherent or implied jurisdiction to commit for contempt—Provision for enforcement of Court orders made by Rule 78 of the Rules of Court.

Summary: The appellants were called on to shew cause why they should not be committed for contempt of court for failure to comply with and breaching the terms of an interdict and were each ordered to pay a fine of £15 or to undergo 2 months' i.c.l., the sentence being suspended on conditions.

Held: The proceedings in the Court *a quo* were of a civil and not of a criminal nature.

Held further: That a Court of Native Commissioner has no inherent or implied jurisdiction to enforce obedience to its orders by committal for contempt.

Held further: That being so, the Native Commissioner should have declined jurisdiction.

Cases referred to:

Mfulwane and Others *v.* Matabane, 1959 (1) S.A. 145.

Wilson *v.* Gandy, 1907, T.S. 250.

Legislation referred to:

Act No. 38 of 1927, Section 10.

Government Notice No. 2886 of 1951.

Works of reference consulted:

"Civil Practice of the Magistrates' Courts in South Africa" by Jones and Buckle.

Appeal from the Court of the Native Commissioner, Rustenburg. Cowan, President.

On the 1st October, 1956, a temporary interdict was granted by the Native Commissioner of Rustenburg restraining the thirteen appellants and forty-seven other Natives from ploughing or cultivating certain lands on the farm Roodekraalspruit and from interfering in any way with the respondent and twenty-six other applicants in the exercise of their rights in respect of the farm.

This interdict was made final on the 23rd November, 1956, the respondents, in those proceedings, being in default.

On the 6th December, 1956, the present respondent served a notice on the thirteen appellants requiring them to appear before the Court of the Native Commissioner on the 14th December to show cause why they should not be committed for contempt of court for failing to comply with and breaching the terms of the interdict. The appellants did not appear on that date but they were represented by their attorney.

The Court held that they had committed contempt of court and they were fined £15 or two months imprisonment with compulsory labour suspended for twelve months on condition that they "in no way interfered with the applicants mentioned in the interdict". Costs of the application were also awarded against them on the attorney and client scale.

An appeal was noted against this judgment but the record of the case was returned by the Registrar of this Court at the instigation of the then President who gave it as his opinion that this Court had no jurisdiction in the matter in view of the fact that the appeal was against a conviction for contempt of court which was a criminal matter.

Thereafter, the matter came before the Transvaal Provincial Division of the Supreme Court—see the case of Mfulwane and Others *v.* Matabane [S.A. 1959 (1) 145]. The head note to that judgment reads as follows:—

> "In the light of Section 9 of Act No. 38 of 1927, if an order of committal for contempt of court made by the Native Commissioner's Court is in its nature a sentence in respect of a criminal offence, then the Supreme Court would alone have appellate jurisdiction in respect thereof. If the proceedings were of a civil nature the Native Appeal Court would have exclusive jurisdiction.

> Where Natives persistently act in breach of an interdict granted by a Native Commissioner and an application is made to him by a person in whose favour the interdict was granted for the committal for contempt of such persons, then the applicant is in fact seeking to bring to its logical conclusion the order which had been given in his favour and the resulting order of committal made by the Native Commissioner is made in proceedings of a civil nature with the result that, in terms of Section 9 of Act No. 38 of 1927, the Native Appeal Court has exclusive jurisdiction to hear an appeal from such order of committal."

This Court is, with respect, in agreement with that decision. Although the Native Commissioner has stated that, in fining the appellants as he did, he acted under the provisions of Section 78 of Government Notice No. 2886 of the 9th November, 1951, it is clear that the parties themselves or, rather, their counsel regarded the proceedings as being of a civil nature and that they were intended to be civil proceedings is borne out by the fact that the appellants were apparently not criminally charged, the Crown did not appear as a party to the action nor were the appellant called on to plead—the matter was, indeed, heard in their absence.

The appeal before this Court was argued on two grounds, viz.:—

1. That the Native Commissioner had no civil jurisdiction to hear the matter and/or to make an order of this nature; and
2. That the respondent had failed to show that the appellants had notice, or knew, of the Court's order (i.e. the interdict).

The Native Commissioner's Court, like the Magistrate's Court, is a creature of statute and the remarks on page 31 of Jones and Buckle, Sixth Edition, dealing with civil jurisdiction generally of Magistrate's Courts, are equally in point when applied to the jurisdiction of Native Commissioners' Courts.

After saying that these Courts have no inherent jurisdiction such as is possessed by the Superior Courts and can claim no authority which cannot be found within the four corners of the Court's Constituent Act, the learned authors go on to say, "Authority may be implied as well as expressed; and, when the Act gives jurisdiction to the Court on its main subject, its purpose is not to be defeated because the ancillary powers which are necessary to enforce that jurisdiction have not been specifically mentioned. It must, however, be remembered that the doctrine of implied jurisdiction can only arise when the Act is silent. *Expressum facit cessare tacitum* . . ." They then quote an extract from the judgment of Innes C. J. who, to quote him more fully, is reported in the case of Wilson *v.* Gandy, 1907, T.S., at page 250 to have said ". . . It is not necessary to express any opinion upon the point whether a magistrate can ever exercise any function which is not expressly conferred upon him in the Proclamation (the proclamation referred to was the Magistrates' Court Proclamation, No. 21 of 1902). But it is clear to me that in regard to matters which the Proclamation does touch the magistrate should keep within the terms of the statute. Where the Proclamation deals with the question of jurisdiction I think that the magistrate is limited to the terms of the sections relating to it . . ." This Court, with great respect, associates itself with these views.

Applying these principles to the matter before us, we find that nowhere in its constituent statute (Act No. 38 of 1927, Section 10), nor in its rules (which are contained in G.N. No. 2886 of 1951) is a Native Commissioner's Civil Court authorised to enforce obedience of an order made by it by committal for contempt in civil proceedings such as these purported to be.

Specific provision for the enforcement of court orders is, however, contained in Section 78 of the Rules of the Court. It follows necessarily, therefore, that the alleged breach of the interdict was not subject to trial by the Native Commissioner as a civil action but that the respondent should have sought redress by resorting to the provisions of Section 78.

For these reasons the Native Commissioner should have held that the institution of civil proceedings was not competent and should have declined jurisdiction.

On this ground alone the appeal must succeed and it is unnecessary for this Court to consider the merits of the further ground of appeal.

The appeal is allowed with costs and the proceedings in the Native Commissioner's Court subsequent to the confirmation of the interdict are set aside. As this point was not raised in the Native Commissioner's Court there will be no order as to costs in that Court.

Smithers and Gafney, Members, concurred.

For Appellant: Adv. Pickard, instructed by A. E. Pohl, Rustenburg.

For Respondent: Adv. Lakier, instructed by Kotze and Duffey, Rustenburg.

CENTRAL NATIVE APPEAL COURT.

MAHLATSI *v.* MAJOLA.

N.A.C. CASE No. 9 OF 1959.

JOHANNESBURG: 25th August, 1959. Before Cowan, President, O'Connell and Fenix, Members of the Court.

PRACTICE AND PROCEDURE.

Unstamped notice of appeal—Reject. Duty of clerks of court to comply with instructions governing submission of records to Appeal Court.

Summary: The notice of appeal was lodged timeously but was not stamped as required by Rule 76 (4), read with Item 10 of Table C of the Second Annexure to the Rules for Native Commissioners' Courts. It still remained unstamped when the case was called for hearing.

Held: That the notice of appeal was void and was not available for any purpose.

Held further: That clerks of court have no discretion and should refuse to accept notices of appeal not stamped in accordance with the relevant Rule.

Cases referred to:
Pretorius *v.* Fourie, 1915, O.P.D. 65.
Hakinijee *v.* Naibi (or Paulus), 1928, N.P.D. 265.
Municipality of Memel *v.* Schafer, 6 S.A.T.C. 203.
Makatini *v.* Makatini, 1955, N.A.C. 69.
Mteto *v.* Matomela, 1916, T.P.D. 82.

Legislation referred to:
Act No. 30 of 1911, Section 22 (1).
Government Notice No. 2886 of 1951.
Government Notice No. 2887 of 1951.

O'Connell, Permanent Member.

The notice of appeal in this case was lodged timeously but was not stamped as required by Rule 76 (4) read with Item 10 of Table C of the Second Annexure to the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended. It remained unstamped after the time for noting an appeal laid down by Rule 4 read with Rule

31 (2) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, had expired and it still remains unstamped. The notice is, therefore, void and it is not available for any purpose—see Section 22 (1) of the Stamp Duties and Fees Act, 1911 (Act No. 30 of 1911), as amended, and the decisions in Pretorius *v.* Fourie (1915 O.P.D. 65); Hakimjee *v.* Naibi (or Paulos) (1928 N.P.D. 265); and Municipality of Memel *v.* Schafer, 6 S.A.T.C. 203). It follows that there is no appeal before us and the matter is, therefore, struck off the roll.

In Makatini *v.* Makatini, 1955, N.A.C. 69, the North-Eastern Native Appeal Court held *inter alia* that a clerk of court *could* refuse to accept an unstamped document purporting to be a notice of appeal. This Court goes further and holds that a clerk of court *should* refuse to accept such a document and should not act upon it—Pretorius *v.* Fourie, *Supra,* and Mteto *v.* Matomela (1916 T.P.D. 82). Such refusal by the clerk of court will have the added advantage of eliminating the altogether unnecessary work and inconvenience which would otherwise be occasioned by the failure to stamp the document and it will also assist in keeping down the cost of litigation. Furthermore, it will obviate the possibility of the clerk of court's having to pay and make good to the Treasury the fee he has omitted to take—see footnote No. 1 (2) to Table C of the Second Annexure to the Rules for Native Commissioners' Courts.

Despite the detailed departmental instructoins on the point, the preparation of appeal records has in many cases of late not received due and proper attention from clerks of court and very ofter the submission of the records is inordinately delayed with consequent dislocation of the work of this Court.

In the present case, the following errors and omissions occur:—

The copies of the record have not been certified as true copies of the original—instead, the clerk of the court has, quite wrongly, duplicated the certificate of record furnished by the judicial officer; the index is incomplete; the security bond is not included in the record; and there is no numbering of the lines of each page as is laid down. It can only be assumed that the clerk of the court is not acquainted with the relevant instructions.

Clerks of court are enjoined, in their own interests, to study and to comply strictly with the instructions governing the preparation and submission of appeal records because, should the unsatisfactory features mentioned continue, there will be no option but to report the officers responsible therefor to the Department for appropriate action.

Cowan, President, and Fenix, Member, concurred.

For Appellant: Mr. Taitz, of Sherman, Taitz and Saiks, Springs.

Respondent in default.

CENTRAL NATIVE APPEAL COURT.

NTHAKA *v.* NTHAKA.

N.A.C. CASE No. 10 OF 1959.

JOHANNESBURG: 24th August, 1959. Before Cowan, President, O'Connell and Fenix, Members of the Court.

PRACTICE AND PROCEDURE.

Sites in Municipal Native Locations—Claims for transfers of site permits—Necessity to join Location Superintendent.

Summary: Flowing from the alleged breach of a contract of sale, plaintiff, who was employed and resided elsewhere, sued defendant for retransfer to his name of the site permit

in respect of a site in the Heilbron Municipal Native Location, ejectment of defendant from the said site and damages.

Held: That the Location Superintendent is vested with the sole right, subject to an appeal to the Native Commissioner, of allocating sites in the location.

Held further: That being so, the Location Superintendent has a direct and substantial interest in any order affecting the rights of any person in and to the occupation of any such site.

Held further: The point being raised *mero motu* by the Court, that the Location Superintendent should have been cited as a party to the proceedings and failure so to cite him constituted a fatal defect in plaintiff's summons.

Cases referred to:

Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A. 637.

Legislation referred to:

Administrator's Notice No. 210 of 1956 (O.F.S.).

O'Connell, Permanent Member.

In the Native Commissioner's Court the plaintiff, who is employed and resides in Port Elizabeth, issued a summons reading as follows:—

"1. That on 23rd May, 1952, plaintiff, who was then the site permit holder of Stand No. 384, Heilbron Location, sold the improvements thereon to defendant for £850 and relinquished his rights to the said permit in favour of defendant.

2. That due to defendant's failure to make payment of the purchase price, the sale was cancelled on 27th December, 1952, but in spite thereof, defendant has wrongfully refused to surrender the site permit and to deliver that portion of the improvements occupied by him to plaintiff.

3. That the value of the occupation of that portion of the improvements over which defendant exercises possession, is £1. 15s. per month.

4. That by reason of defendant's refusal to vacate the premises in question, plaintiff is suffering damages at the rate of £1. 15s. per month.

Wherefore plaintiff prays for judgment against defendant for (*a*) an Order compelling him to surrender his site permit in and to Stand No. 384, Heilbron Location; (*b*) ejectment from the said stand; (*c*) payment of damages at the rate of £1. 15s. per month as and from 27th December, 1952, to date of ejectment or so much thereof as the Court may find not to have become prescribed; (*d*) alternative relief, and costs."

The defence was a denial that the defendant had purchased the improvements from the plaintiff and that he had entered into an agreement of cancellation of the alleged sale.

After hearing evidence the Native Commissioner entered the following judgment:—

"Vonnis vir eiser soos gevra onder (*a*) en (*b*) en vir (*c*) tot 'n bedrag van £22. 15s. en verweerder word toegelaat om tot 10 Mei 1959 te okkupeer, met koste van geding."

Against this judgment appeal has been noted on the grounds that it is against the evidence and the weight of evidence.

Counsel for the appellant addressed the Court on the facts and it was then conceded by both counsel that the Heilbron Location, and the sites into which it is divided, is the property of the Municipality of Heilbron. The Court thereupon *mero motu* raised the point whether it was competent to make the prayer (*a*) in the summons without joining the Location Superintendent

who appeared to be directly interested in the result of the action. In addition, as the legal position is that the improvements erected on the site adhere to the soil and are, therefore, the property of the owner of the soil, the Court raised the point whether the plaintiff, who was not the site permit holder, had the necessary *locus standi in judicio* to bring an action for the defendant's ejectment from the property and the ancillary claim for damages.

It was thereupon agreed by both Counsel that Administrator's Notice No. 210 of 1956 contained the relative location regulations be handed into Court.

Though Counsel for the plaintiff contended that by asking for an order compelling the defendant to surrender his site permit the plaintiff intended that the permit should be surrendered to the Location Superintendent which would then leave it open to the plaintiff to apply to the Superintendent for the transfer of the site to him, this Court cannot place the same construction on the prayer as it is abundantly clear from the plaintiff's own evidence that he was, in fact, claiming the transfer of the stand permit to his name.

Regulation 9 (2) of the Heilbron Native Location Regulations provides that "No site permit shall be transferred without the prior written permission of the Superintendent and that such permission shall be granted on the Superintendent's being satisfied that the transferee fulfils the conditions set out in paragraphs (*a*) to, and including (*f*) of sub-regulation (2) of regulation 5". Among these conditions are the following: That the proposed transferee is—

(*a*) a fit and proper person to reside in the location;
(*b*) employed or is following some lawful occupation or calling within the urban area;
(*c*) lawfully permitted to enter, be, and remain in the urban area.

It is clear that the Location Superintendent is vested with the sole right, subject to an appeal to the Naive Commissioner, of allocating sites in the location. He has, therefore, a direct and substantial interest in any order the Court might make affecting the rights of either of the parties in and to the occupation of the site in question and his co-operation would be necessary to implement any such order. Unless he were joined in the action, he could well ignore any such order because it would not be binding on him. Applying the principles enunciated by the Appellate Division in Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A. 637, this Court holds the view that the Location Superintendent should have been joined as a party to the action and for this reason cannot confirm the judgment of the Court *a quo* which, in the absence of such joinder, is a mere *brutum fulmen*. It was suggested by Counsel that the case be referred back to the Native Commissioner so that the necessary joinder may be made but it is not possible to adopt this suggestion because the Location Superintendent is not subject to the jurisdiction of the Native Commissioner's Court.

Claims (*b*) and (*c*), i.e., the claims for ejectment and damages, are dependent upon and ancillary to claim (*a*) and because of the failure of that claim they must necessarily fall away.

For these reasons, the appeal must succeed but as the points on which it does succeed were not raised by Counsel in this Court, or in the Court below, there will be no order as to costs in either Court. In view of this decision, it is not necessary or advisable to deal with the merits.

The appeal is allowed and the judgment of the Native Commissioner is altered to read "Summons dismissed. No order as to costs".

Cowan, President, and Feniz, Member, concurred.

For Appellant: Advocate H. P. van Dyk, instructed by Malan and Raubenheimer, Vereeniging.

For Respondent: Mr. Stoloff, instructed by Steyn, Nolte and Wiid, Vereeniging.